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SUPREME COURT
OF THE
UNITED STATES

No._____

OCTOBER TERM, 1983

ROBERT SINGER,

Petitioner,

v.

**BRAD GATES, sheriff-Coroner,
COUNTY OF ORANGE, and
COUNTY OF ORANGE,**

Respondents.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the requirement of "good cause" to deny or revoke the statutory benefits of honorably retired deputy sheriffs create a reasonable expectation of entitlement sufficient to implicate the Due Process Clause of the Fourteenth Amendment?

2. Whether the endorsement on the retired deputy sheriffs' certificate, as required by California **Penal Code** § § 12027 and 12031, constitutes a publication of defamatory and stigmatizing information, i. e., that "good cause" exists to deny or revoke the statutory rights found in § § 12027 and 12031. If so, has petitioner suffered a loss of his liberty interest within the meaning of the Fourteenth Amendment?

3. When a Federal Court must determine the existence of a property interest protectableby the Fourteenth Amendment by reference to State law, may the Federal Court disregard the decision of the State Court of Appeals on the identical legal question and render a contrary decision?

4. Can the United States Court of Appeals for the Ninth Circuit ignore the decision of the California Court of Appeal and the admission of respondents that California **Penal Code** § § 12027 and 12031 create a statutory entitlement for retired California Peace Officers which the California Court of Appeal finds to be a protected pro-

perty interest under the Fourteenth Amendment. If not, must the Federal Court abstain or follow the California Court of Appeal's interpretation of state law?

CERTIFICATION AS TO INTERESTED PARTIES

Counsel for the Petitioner hereby certifies that there are no other parties of interest in the case at bar except those listed in the caption and their attorneys of record. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.

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IN THE UNITED STATES SUPREME COURT

October Term, 1984

No.

ROBERT SINGER,

Petitioner,

v.

BRAD GATES, Sheriff-Coroner,
COUNTY OF ORANGE, and
COUNTY OF ORANGE,

Respondents.

I

PETITION FOR WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Singer, the petitioner herein, prays a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on September 23, 1983.

II

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 716 F.2d 733 (9th Cir. 1983) and is printed in Appendix "A" hereto, infra.
The Judgment of the United States District Court for the Central District of California is printed in Appendix "A" hereto, infra.

III

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit (Appendix "A", infra.) was entered on September 23, 1983. The jurisdiction of the Supreme Court is invoked under Title 28, U.S.C. §1254.

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV[1]
Title 42, United States Code §1983[2]
California Penal Code §12027[3]
California Penal Code §12031[4]
California Rules of Court, Rule 976(b)[5]

V

STATEMENT OF THE CASE

This action was originally commenced in the United States District Court for the Central District of California by the Association of Orange County Deputy Sheriffs and four (4) medically disabled retired deputy sheriffs of the County of Orange. Deputies Byrd and White were dis-

1) Appendix "D".
2) Appendix "E".
3) Appendix "F".
4) Appendix "G".
5) Appendix "H".

missed from the action by the District Court on the District Court's ruling that they did not present a case or controversy, within Article III, since they did not reside in the State of California. [6] Cross Motions for Summary Judgment were considered by the District Court and judgment was entered in favor of the defendants on July 6, 1982.[7] On July 16, 1982, a Notice of Appeal to the United States Court of Appeal for the Ninth Circuit was filed.[8] On September 23, 1983, the United States Court of Appeal for the Ninth Circuit upheld the trial Court's decision.[9]

The focal point of this litigation concerns the provisions of California **Penal Code** § § 12027(a) and 12031(b)(1). The petitioner herein applied for a position as a diamond courier escort for the International Diamond Company. He was interviewed by the head of security for the company and was informed that he must carry a concealed weapon to qualify for the position. As a result of the failure of the Sheriff of Orange County to endorse his retirement identification card in the manner prescribed by California **Penal Code** § 12027 and 12031, concerning the right to continue to carry a concealed weapon upon retirement, the petitioner was denied the employment.[10] California

6) Appendix "B", p. 3, l. 20-23.
7) Appendix "I", United States District Court Docket Entry (hereinafter "D.E.") 51.
8) Id., D.E. 52.
9) Appendix "I", D.E. 11, p. 2.
10) Appendix "A".

Penal Code § § 12027(a) and 12031(b)(1) require "good cause" to "deny or revoke" the retired officer's privelege to carry a weapon as provided in both California Penal Code § § 12027 and 12031. Petitioner has never been given notice of the "good cause" that is claimed to exist to "deny or revoke" the statutory entitlements; nor has he ever been given a hearing or opportunity to confront the allegations of "good cause" which are a statutory pre-requisite to the denial and/or revocation of the statutory entitlements.[11]

Petitioner, Robert Singer, was employed as a full-time deputy sheriff by the County of Orange from January 2, 1968 until medically retired; at which time he was honorably retired from that employment due to job-related injuries.[12] A peace officer, retiring due to job-related injuries, retires at 50% of the salary that he received as a full-time employee.[13] Disability retirements often occur at times when the officers are financially unprepared for the consequences of the severe reduction in pay that is a normal consequence of such retirement. The average police officer seeks to supplement his retirement income with employment in a field that is related to his police employment and experience.[14] This employment may be full or part-time and may range from menial security positions to any number of other positions that require the training which a retired police officer may

11) Id., p. 4.
12) Id., D.E. 39, Exhibit 1.
13) California Government Code § 31727.4.
14) Appendix "I". D.E. 2, 4, 8-11, 14, 15, 37, 38, 45, 46 and 48.

have.[15] In many cases, the prime asset which allows the retired police officer access to employment, even though partially disabled, is a statutory right to carry a weapon as granted in California **Penal Code** § § 12027 and 12031.[16] Absent "good cause", the right to carry a concealed weapon is statutorily absolute. Petitioner contends that he has more than a mere unilateral expectation or an abstract need or desire for the entitlement in that the entitlement allows him to be employable within his field of training, experience and education. The contention of the petitioner is that, absent "good cause", he is entitled to the benefits conferred upon him by statute. As such, petitioner claims the protected property interest was created by the statutes which may be divested only upon a showing of "good cause" in accordance with the guarantees of procedural due process.[17]

Additionally, the publication by way of negative endorsement upon the retirement certificate, that the petitioner is not entitled to carry a concealed weapon stigmatizes the petitioner by communicating to ary prospective employer the fact that "good cause" exists to deny or revoke the statutory entitlement as found in both California **Penal Code** § § 12027 and 12031. This denies the petitioner employment and career advancement opportunities upon retirement albeit "good cause" has never

15) Id.
16) Id.
17) This contention was upheld by the California Court of Appeals; see discussion infra. p. 8.

been demonstrated to deny the benefit. Common sense would lead a reasonable man to conclude that a negative weapons endorsement on the statutorily required retirement identification must be based on "good cause".

VI

REASONS FOR GRANTING THE WRIT

VI(a)

The United States Court of Appeals has construed California Penal Code § § 12027 and 12031 in a manner which contravenes the interpretation of the identical statutes by the California Court of Appeals.

Shortly prior to the oral arguments before the United States Court of Appeals for the Ninth Circuit, the California Court of Appeals decided the case of **Monzingo v. Garden Grove**, 190 Cal.Rptr. 750 (1983). This decision was presented to the United States Court of Appeals prior to oral arguments. The California Court of Appeals interpreted California Penal Code § § 12027 and 12031 as creating a legitimate claim of entitlement to the benefits contained therein within the meaning of the Due

Process Clause of the Fourteenth Amendment to the United States Constitution. Despite this fact, the United States Court of Appeals upheld the decision of the District Court and stated:

> "This court finds, as did the court below, that the requirement of 'good cause' prior to the denial of a weapons certificate does not create a constitutionally protected interest, because it is not a 'significant substantive restriction on the basis for [the] agency's action'." 716 F. 2d at 734

The California Court of Appeals stated, as to these same **Penal Code** sections:

> "By the language of the statute, it may only be taken from them on a showing of 'good cause'. Certainly, any active or honorably retired city police officer under these provisions has 'a legitimate claim of entitlement to' the privilege (see **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 , 33 L.Ed. 2d 548)."

The petitioner respectfully submits that the opinion of the United States Court of Appeals fails to properly recognize the obligation of the Federal Courts to follow the decisions of the State Court when interpreting state statutes. **Ferrell v. Estelle**, 573 F.2d 867 (5th Cir. 1978); **Sparks v. Duval County Ranch Co.**, 604 F.2d 976, 979 (5th Cir. 1979) (en banc), cert. den. 445 U.S. 943, 100 S. Ct. 1339, 63 L.Ed 2d 777, granted sub. nom.

Dennis v. Sparks, 445 U.S. 942, 100 S. Ct. 1336, 63 L.Ed 2d 775 (1980).

The decisions of an intermediate Appellate Court of California are binding on the Federal Courts. **California v. Taylor**, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed 2d 1034 (1957); **California's District Courts of Appeal, Six Counties of California v. Joint Highway District**, 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed 114 (1940) reh. den. 311 U.S. 730, 61 S.Ct. 438, 85 L.Ed 475, 311 U.S. 730 (1941); **Sears, Roebuck & Co. v. Marhenke**, 121 F.2d 598 (9th Cir. 1941). See also, **Curry v. Fred Olsen Line**, 367 F.2d 921, 924, fn. 10 (9th Cir. 1966); **Werner v. Hearst Publishing Co.**, 297 F. 2d 145, 148 (9th Cir. 1961); **Fidelity Union Trust Co. v. Field**, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed 109, (1940), reh. den. 311 U.S. 730, 61 S.Ct. 438, 85 L.Ed 475, reh. den. 314 U.S. 709, 62 S. Ct. 118, 86 L. Ed 565 (1941); **West v. American Telephone & Telegraph Co.**, 311 U.S. 223, 61 S.Ct. 179 85 L.Ed 139 (1940).

In **Fidelity Union Trust Co. v. Field**, 311 U.S. 169, this Court held:

> "An intermediate state court in declaring and applying the state law is acting as an organ of the State in its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding the state question. We have declared that principle in **West v. American Telephone & Telegraph Co.** [citation omitted]. It is true that in

that case an intermediate appellate court of the state had determined the immediate question as between the same parties in a prior suit, and the highest state court has refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its reasoning independent of that construction and the effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation." Id., at 311 U.S. 178

Property interests are created by state law. **Board of Regents v. Roth**, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed 2d 548 (1972). To determine if a property interest, protected by the Fourteenth Amendment, exists reference to state law must be had. **Bishop v. Wood**, 426 U.S. 341, 345, 96 S.Ct. 2074, 48 L.Ed 2d 684 (1976). The Ninth Circuit has made no attempt to show what convincing evidence exists to show that state law is not as stated by the California Court of Appeals, albeit the decision was left undisturbed by the California Supreme Court.[18]

18) Appendix "C", p. 1.

In this case, the appellees did not even place the right to the statutory entitlement in issue since they:

> ". . .admit that California **Penal Code** Sections 12027 and 12031 entitles honorably retired peace officers to the privilege of carrying concealed weapons, . . ." Answer, Paragraph 19.[19]

A finding that California **Penal Code** § § 12027 and 12031 do not entitle these appellants to this right does violence to the **Federal Rules of Civil Procedure**, Rule 8(d). "The allegations are to be treated as admitted since not denied." **Legal Aid Society of Alameda County v. Brennan**, 608 F. 2d 1319, 1334 (9th Cir. 1979). The County, as an agency of the State, admitted the entitlement, but controberted the eligibility of appellants entitlement by claiming the appellants were not honorably retired.[20] This admission was not addressed and in Footnote 2 of its opinion, the United States Court of Appeals stated:

> :"This Court, as did the District Court, assumes appellants are equal in status to those honorably discharged." 716 F.2d at 733, fn.2

In determining the reasonable expectation of entitlement the Court of Appeals stated:

> "A reasonable expectation of entitlement is determined largely by the language of a statute

19) Appendix "I", D.E. 13.
20) Id.

and the extent to which the entitlement is couched in mandatory terms. 716 F.2d at 734"

Appellants respectfully submit that assuming this proposition to be true, the Court cannot ignore the judicial interpretations of the State Court of Appeals as well as respondents' admission of statutory entitlement. Respondents admit:

> "Prior to the 1974, all active and honorably retired peace officers had an unrestrained privilege of exemption from the requirements of **Penal Code** § 12025, which made carrying a concealed weapon a crime."[21]

They argue further that since the benefits found in California **Penal Code** § § 12027 and 12031 "only arises by permission of the state Legislature" that there is no property interest created by the statutes.[22]

In support of this argument, respondents argued the contention presented and rejected in **Monzingo v. City of Garden Grove, supra:**

> "Neither plaintiffs nor any other citizen of the United States have any property right to carry a concealed weapon. The case as cited by plaintiffs are inapposite. They deal with rights, such an [sic] entitlement to a public education, to jobs, welfare and benefits which are bestowed by government."
>
> In the instant case, where there is statutory authority which allows specific citizens the

21) Id., D.E. 29, p. 8, l. 23-26.
22) Id., D.E. 33, p. 4, l. 11-12.

privilege of carrying a concealed weapon, this privilege does not rise to an individual property right (Appendix "I", D.E. 33, p. 4, l. 17-20).

Additionally, it is also unknown, to the petitioner, the extent upon which the United States District Court relied upon purported California Trial Court interpretations of Penal Code § § 12027 and 12031 since the District Court's opinion is silent on this point. It is clearly stated by respondents, in their pleadings before the District Court, that two (2) Superior Courts of the State of California had found no property interest existed with regard to California Penal Code § § 12027 and 12031.[23] Respondents argued that the California Courts had not afforded due process hearings for these statutes (Appendix "I", p.8, l. 11-17).[24] Yet these same respondents argue that a California Court of Appeals decision, squarely on point and interpreting these very statutes, is without precedential value. On the record before this Court, the petitioner cannot determine whether or not the District Court followed the purported decisions of a Trial Court of the State of California which, as a result of the decision of the California Court of Appeals must be viewed as overruled.

The United States Court of Appeals, if in doubt as to the validity of the decision of the California Court of Appeals, should have abstained when faced with this situation. Boehning v. Indiana Employees Association, 423

23) Appendix "I". D.E. 29, p. 8, l. 13-17.

24) No compliance with Title 28, United States Code § 1738 was attempted by respondents.

U.S. 6, 96 S. Ct. 168, 46 L. Ed. 2d 148 (1975), or, alternatively required further briefing on the claim of appellee that the decision was of no precedential value.[25]

Subsequent to oral arguments before the U.S. Court of Appeals, the California Supreme Court ordered the **Monzingo** decision unpublished pursuant to California **Rules of Court,** Rule 977. The Court gave no reason for its ruling or its order and, under the appropriate criteria for publication of intermediate appellate court decisions in California, the opinion presumably failed to qualify for publication under California **Rules of Court,** Rule 976(b).[26] The State Supreme Court did not overrule or modify the decision. While the United States Court of Appeals for the Ninth Circuit **Local Rules of Court,** Rule 21(c) states that an unpublished opinion of that Court is not of precedential value, the California Courts do not seem to so view unpublished opinions:

> "Several decisions stated, 'in one way or another that a non-published decision is not available as a precedent (citations omitted). Rule977 does not say this. It says only that a non-

25) Petitioner requested to brief the issue after respondents, by letter, indicated to the panel that **Monzingo, supra,** was of no precedential value but no briefing was permitted.

26) Appendix "H". To qualify for publication the opinion must meet the standard of the California Rules of Court, Rule 976(b) which states: (b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an Appellate Department of the Superior Court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law, or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest or (3) criticizes existing law.

published opinion shall not be cited by a court or party." Gray v. Kay, 47 Cal.App.3d 562 (1975) (Emphasis in original).

The United States Court of Appeals apparently accepted, without argument or briefing, the contention of the respondents that the order of the California Supreme Court which unpublished the previously published appellate decision also removed any precedential authority. This issue was not addressed in the decision of the United States Court of Appeals.

Even had the precedential value been negated, petitioners believe that such an expression of statutory construction by the State Trial Court and the Appellate Court should caution against the contrary construction of California Penal Code § § 12027 and 12031 adopted by the United States Court of Appeals.

VI(b)

The United States Court of Appeals and the United States District Court Have Decided an Important Question of Federal Law in a Way that Conflicts with the Applicable Decisions of this Court and Other Circuits.

The United States Court of Appeals and the United

States District Court have determined that the term "good cause" is of no consequence and is not a significant substantive restriction on the basis for the local government's action in denying the benefits conferred by **Penal Code** § § 12027 and 12031 upon honorably retired peace officers of the State of California. The District Court stated "There is no definition of good cause, and no other details in the statutes which would limit the agency's discretion.[27] The broad reach of the implications of this decision,[28] coupled with the failure to find that the Legislature's use of the phrase "good cause" creates a legitimate claim of entitlement, much less any restriction, protectable under the due process clause, is unsupported even by the decisions of the Ninth Circuit. A review of the history of **Penal Code** § § 12027 and 12031 shows that petitioner has had, since the date of his employment, an exemption to the prohibition against carrying a concealed weapon in the State of California. The "good cause" requirements prior to denying this right of an honorable retirement cannot, with all reason, be characterized as an abstract need or desire; nor as a unilateral expectation. This Court has stated:

> "The hallmark of property, the court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." (Citations omitted)

27) Appendix "B", p. 7, l. 17 to p. 8, l. 2.

28) Petitioner is unaware of the total number of retired officers whose rights will be affected.

Once that characteristice is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating to the whole domain of social and economic fact." (Citations omitted). **Logan v. Zimmerman Brush Company**, 455 U.S. 422, 430-431, 102 S. Ct. 1148, 71 L.Ed 2d 265 (1982).

The requirements of "cause" prior to deprivation has been held to be the essential trigger mechanism for creating an expectation of entitlement in cases too numerous to mention. To decide, in light of this Court's precedents, that the words "good cause", placed in these statutes by the California Legislature as part of a limiting factor on the previously absolute exception vested in retired peace officers, is tantamount to the total removal of the phrase "good cause" from the statute. The requirement that there be "good cause" to deny or revoke the benefit does not give the discretion as to whether or not to grant the entitlement since the entitlement is granted by the statute itself. The requirement of the term "good cause" is an objective, as opposed to a subjective and personal, test of the sufficiency of the cause. **Local 205, United Electrical, Radio & Machine Workers of America (UE) v. General Electric Company**, 172 F.Supp. 53 (D. Mass. 1959).

In **Memphis Light, Gas & Water Div. v. Craft**, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 56 L.Ed 2d 30 (1978), this Court stated:

"Because petitioners may terminate services

only 'for cause' (fn. omitted) respondents assert a 'legitimate claim of entitlement' within the protection of the due process clause."

This rationale has been followed in **Goss v. Lopez**, 419 U.S. 565, 573-574, 95 S.Ct. 729, 42 L.Ed 2d 725 (1975); **Board of Regents v. Roth**, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 33 L.Ed 2d 548 (1972); **Arnett v. Kennedy**, 416 U.S. 134, 207-208, 94 S.Ct. 1633, 40 L.Ed 2d 15 (1974); **Mathews v. Eldridge**, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); **Connell v. Higginbotham**, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed 2d 418 (1971); **Bell v. Burson** 402 U.S. 535, 91 S.Ct. 1586 29 L.Ed 2d 90 (1971); **Goldberg v. Kelly**, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed 2d 287 (1970); **Mullane v. Central Hanover Bank & Trust Company**, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed 865 (1950); **Bishop v. Wood**, 426 U.S. 341, 345, 96. S. Ct. 2074, 48 L.Ed 684 (1976); **Baer v. City of Wauwatosa**, 716 F.2d 1117 (7th Cir. 1983); **Jones v. Los Angeles Community College District**, 702 F.2d 203 (9th Cir. 1983); **Barnett v. Housing Authority of City of Atlanta**, 707 F.2d 1571 (11th Cir. 1983); **Bueno v. City of Donna**, 714 F.2d 484 (5th Cir. 1983); **Brockert v. Skornicka**, 711 F.2d 1376 (7th Cir. 1983).

Moreover, California **Penal Code §§ 12027** and 12031 do not speak in the terms of a license "applicant". They deal with "the retired officers privilege to carry a weapon". This privilege,[29] unrestrained prior to 1974 and

29) This Court rejected the distinction between "right" and "privilege" in **Board of Regents v. Roth**, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 33 L.Ed 2d 548 (1972).

thus previously absolute, was modified to allow the agency from which the peace officer is honorabley retired to deny or revoke the privilege, for "good cause", upon initial retirement or at any time subsequent thereto. The most obvious fact, that distinguishes this case from an instance where one applies for a license or other benefit which he has **not enjoyed in the past**, is the fact that the peace officer who is retiring has enjoyed the exemption up to the time of retirement and, by the language of the statute, may expect to continue to enjoy the exemption unless there is "good cause" to deny or revoke. The Ninth Circuit in relying upon their prior interpretation of California **Penal Code** § § 12050 appears to have failed to consider this fundamental factual distinction (See **Erdelyi v. O'Brian**, 680 F.2d 61 (9th Cir. 1982). In **Erdelyi**, the plaintiff was an individual who sought to obtain a **permit** to carry a concealed weapon; a right that she had never before possessed. The Chief of Police of the City of Manhattan Beach declined to issue the permit. It is important to note that California **Penal Code** § 12050 does not contain a requirement that there be "good cause" to deny or revoke an exemption but, in its own statutory terms, grants discretion to **issue** a permit which would, for the first time, create a right or benefit not previously possessed by the "applicant". Thus, in **Erdelyi**, the plaintiff had not lost a benefit. The difference between **Erdelyi** and this case is dramatic. This petitioner has had the right to earn a living based on a statutory exemption which he has been vested

with for his many years as a peace officer. The denial or revocation of the right removes the benefit whereas in **Erdelyi**, the denial merely prevents the benefit from occurring. Even the language of the **Erdelyi** decision confirms this fact:

> "Section 12050 **explicitly** grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements. Where State law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, **initial applicants** do not have a property right in such licenses protected by the Fourteenth Amendment. **id.**, 680 F. 2d at 63." (Emphasis added)

In this case, the petitioner is not an initial "applicant" and the respondent is not explicitly granted discretion to grant or deny a license. Respondent's function is limited to denying or revoking the privilege upon a showing of "good cause".

The Ninth Circuit and District Court also relied on the decision of **Jacobson v. Hannifin**, 627 F. 2d 177 (9th Cir. 1980). In **Jacobson**, the Court found that the "application" for a "license" could be denied under Nevada law for "any cause" (Nev. Rev. Stat. § 463.220). Again, however, the "applicant" was seeking a right which he did not have at the time the application was made. The discretion to be exercised, if any, in petitioner's case is to deny or revoke

for "good cause". Simply put, a determination that "good cause" existed to deny or revoke the privilege is required at the time the retirement certificate is issued to the petitioner. The retirement certificate must be issued, pursuant to California **Penal Code** § 12027, and must be endorsed pursuant thereto concerning the retired officers right to continue to carry a weapon. That ministerial duty does not confer unfettered discretion upon the sheriff or respondent county. By analogy, this Court's decision in **Bell v. Burson**, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) is extremely on point:

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involve state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." **Id.**, p. 539.

There is an entitlement which the evidence shows plays a significant role in the disabled deputy sheriff's ability to earn a livelihood upon retirement. This entitlement is not created by the officers' retirement; but in fact is vested in the deputy sheriff until the date of retirement and beyond the date of retirement unless, at the time of retirement or subsequent thereto, "good cause" is shown to deny or revoke the entitlement. What the District Court and the United States Court of Appeals appear to say is that there

is no entitlement which is being divested. That is not the status of California law as determined by the California Appellate Court.

VI(c)

Respondents Admitted the Entitlement Claimed By Petitioner Pursuant To California Penal Code § § 12027 and 12031

In his complaint, petitioner pled:

> "**Penal Code** § 12027(a), in conjunction with **Penal Code** § 12031, statutorily entitled retired peace officers the privilege of carrying concealed weapons. Said statutory entitlement amounts to a 'property right', and as such is protected by the Fourteenth Amendment to the United States Constitution. (Petitioner's Complaint, Paragraph 23)."[30]

Respondents' Answer stated, at paragraph 19:

> "As to the allegations of paragraph 23, admit that California **Penal Code** § § 12027 and 12031 entitle honorably retired officers to the privilege of carrying concealed weapons, and, except as so

30) Appendix "I", D.E. 1, p. 8, l. 15-20.

admitted, deny generally and specifically, conjunctively and disjunctively, each and every other allegation contained therein.[31]

The United States Court of Appeals found, as a matter of law, no entitlement under the California **Penal Code** § § 12027 and 12031. The **Federal Rules of Civil Procedure**, Rule 8(d) provides:

> "(d) EFFECT OF FAILURE TO DENY. Averments in a pleadings to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required, or permitted shall be taken as denied or avoided."

Having admitted the entitlement to the benefits of California **Penal Code** § § 12027 and 12031 the respondent then urged the Trial Court and Court of Appeals to find no property interest protectable by the Fourteenth Amendment. Such a construction is contradictory since such an entitlement, under **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.Ed. 2d 548 (1972), normally creates a property interest. Additionally, the admission raises the factual question with regard to a mutually explicit understanding sufficient to create a protectable

31) See footnote 19, supra.

property interest.[32] The representatives of several thousand California peace officers show that the statute is understood to grant a property interest and an entitlement, absent "good cause", to carry a weapon upon retirement.[33] The respondent presented no evidence to the contrary and the sole support for the decision of the Trial Court and the Court of Appeals is to be found in California **Penal Code** §§12027 and 12031.[34] Petitioner submits that even assuming the correctness of the interpretation of the phrase "good cause" by both the trial Court and the Court of Appeals it is error to divest the petitioner of his opportunity to show a factually based mutually explicit understanding sufficient to create a protected property interest. The evidence does not support a contrary factual conclusion. Declarations were received and filed in this case from Mr. Al Angele, a Commissioner of the State Commission on Peace Officers Standard & Training of the Department of Justice; Mr. Ken Harris, of the Denver Police Protective Association; Messrs. Bob MacLeod, Michael Johnson, Robert Singer, Michael Stover and Glen Clary of the Association of Orange County Deputy Sheriffs; Mr. Les Robins of the Association of Los Angeles County Deputy Sheriffs; Mr. Wendell Phillips, of the Sacramento County Deputy Sheriffs Association; and Mr. Dave Baca of the

32) See **Perry v. Sindermann**, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed 2d 570 (1972).
33) See **footnote 14, supra.**
34) 716 F.2d 733, 735, fn. 7; Appendix "A", p. 2.

Los Angeles Police Protective League.[35]

The declarants additionally show that the entitlement to the benefits found in § § 12027 and 12031 of the California **Penal Code** have a significant impact on a disabled peace officers' ability to earn a livelihood to augment their retirement benefits and that they understand a negative endorsement to mean "good cause" exists to prohibit the officer from continuing to carry a weapon.

VII

ABSTENTION OR CONCURRENCE WITH THE CALIFORNIA COURT OF APPEALS' INTERPRETATION IS REQUIRED BY THE DOCTRINE OF COMITY

The Court of Appeal ., Fourth Appellate District, Division One, State of California, stated in **Monzingo v. City of Garden Grove**, 190 Cal.Rptr. 750 (1983):

> The Legislature has given city police officers, as well as retired city police officers, this exemption, a statutory privilege. By the language of the statute, it may only be taken from them on a showing of 'good cause'. Certainly, any active or honorably retired city police officer under these provisions has 'a legitimate claim of entitlement to' the privilege (see **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548)."

35) See footnote 14.

While this decision refers to city police officers there is no statutory distinction between them and deputy sheriffs under California **Penal Code** § § 12027 and 12031 (see California **Penal Code** § § 830.0 et. seq.)

In this case, the lower Federal Courts were not faced with an absence of guidance by authoritative State Courts. **cf. McGregor v. State Mutual Life Assurance Co.**, 315 U.S. 280, 62 S. Ct. 903, 86 L. Ed. 846 (1942). The California decision "has at least raised such doubt as to the applicable . . . law" that the decision of the lower Federal Courts should not stand. **Huddleston v. Dwyer**, 322 U.S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246 (1944). Thus, while "mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal . . ."[36] this Court now faces the prospect of a square contradiction of the state's construction of its statutes by a Federal Court of Appeal.

> "* * * The principle is well established and without dispute that under the rule of comity under our dual [federal and state] system of Government in cases involving state laws * * * equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and

36) **Lehman Brothers v. Schein**, 416 U.S. 386, 390, 94 S.Ct. 1741, 40 L.Ed 2d 215 (1974).

complete determination of the controversy [available to them] in a state tribunal. * * * The Supreme Court has held that where there is pending in the federal court a case involving the construction of a state law and if one construction will remove the federal question a federal court should stay its hand, retain jurisdiction and relegate the parties to the state courts to first seek a construction of the statute. * * *" **General Investment & Serv. Corp. v. Wichita Water Co.**, C.A. 10th (1956), 236 F.2d 464, 468 [4], citing **Meredith v. City of Winter Haven**, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed 9 (1943). It is only when "* * * the relevant state constitutional and statutory provisions are plain and unambiguous * * *" that a federal court should not abstain to permit a state court to decide questions of state law involved in federal litigation. **Davis v. Mann** 377 U.S. 678, 690, 84 S.Ct. 1441, 12 L.Ed. 2d 609, (1964).

It has been held, in fact, that where "* * * it does not appear that the statutory [provisions] in question have as yet been construed by the state courts* * *", it is error for a federal court to

dispose "* * * of the complaint on the merits. * * *" Shipman v. DuPre, 339 U.S. 321, 322, 70 S.Ct. 640, 94 L.Ed. 877, (1950). The rule has been thus stated. Dodd v. Barnes, 279 F.Supp. 291, 293-294 (E.D. Tenn. 1967).

This Court stated:

> "We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made." Hillsborough Township v. Cromwell, 326 U.S. 620, 628, 66 S. Ct. 445, 90 L. Ed. 358 (1946).

In this case, albeit the United States Court of Appeals commented upon its obligation to follow state law and specifically mentioned the Monzingo decision during oral arguments, it did not do so. Nor did it offer any reason for disregarding the decision of the State Appellate Court. In the case at bar, unlike Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir. 1980), the Ninth Circuit did have "directly or indirectly" an assessment of the "predisposition" of the State Courts and ruled squarely against the State Court's interpretation.

The Ninth Circuit Court of Appeals knew of the **Mozingo** decision and the predisposition of the California Court of Appeals. It is worth noting that the very California Court of Appeals that issued **Monzingo v. City of Garden Grove, supra,** would hear any case in which Federal Court abstained.[37] Venue for a trial Court would have been the Superior Court, County of Orange, State of California. California **Code of Civil Procedure** §394.

Thus, in addition to the total disregard of the State Court's decision, the State Court responsible for the **Monzingo** decision was denied the opportunity to affirm the status of state law. As noted in **Factors Etc., Inc. v. Pro Arts, Inc.**, 652 F. 2d 278, 282-283 (2nd Cir. 1981), "a Federal Court's decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal."

Nor, under the particular circumstances of this case can the interests established by the rule of comity be served. The California Supreme Court declined to reverse the California Court of Appeals' decision in **Monzingo v. City of Garden Grove;**[38]

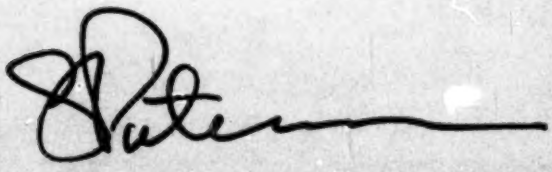
[37] California Government Code §69104 provides: "The Court of Appeal for the Fourth Appellate District consists of three divisions. One division shall hold its regular sessions at San Diego and shall have six judges. One division shall hold its regular sessions at San Bernardino and shall have four judges. One division shall hold its regular session in Orange County and shall have four judges.

38) Appendix "C", p. 1.

The United States Court of Appeals confronted with a decision of the State Court of Appeals, failed to abstain to the very Trial and Appellate Courts responsible for the decision which it ignores and published its contrary decision, effectively silencing the thunder of the State Court and injecting its own footnotes

CONCLUSION

The Petition for Writ of Certiorari should be granted, the judgment vacated, and the case remanded to the United States Court of Appeals for further consideration in light of **Logan v. Zimmermann Brush Co.**, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) and **Monzingo v. City of Garden Grove**, 190 Cal. Rptr. 750 (1983) with directions to ascertain, by abstention or assessment, the predisposition of the State Courts in interpreting California Penal Code 12027 and 12031.



STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioner knows of no cases that are related to this appeal which are now pending before this court.

DATED: December 22, 1983.

Gregory G. Petersen
Attorney for Petitioner

APPENDIX A

ASS'N OF ORANGE COUNTY DEPUTY SHERIFFS v. GATES

ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, George Byrd, Robert Singer, Cliff Miller, and John White, Plaintiffs/Appellants,

v.

Brad GATES, Sheriff-Coroner, County of Orange, and County of Orange, Defendants/Appellees,

No. 82-5686.

United States Court of Appeals, Ninth Circuit

Argued and Submitted May 3, 1983.

Decided Sept. 23, 1983.

Former deputy sheriffs retired under medical disability brought civil rights action alleging they had been denied certificates allowing them to carry concealed and loaded weapons. The United States District Court for the Central District of California, Malcolm M. Lucas, J., granted

summary judgment against the deputies, and they appealed. The Court of Appeals, Chambers, Circuit Judge, held that statute providing for issuance of certificates allowing retired peace officers to carry concealed and loaded weapons did not create entitlement sufficient to warrant constitutional protection.

Affirmed.

Constitutional Law 252.5
Weapons 12

Statute providing for issuance of certificates allowing retired peace officers to carry concealed and loaded weapons did not create entitlement sufficient to warrant constitutional protection. U.S.C.A. Const. Amend. 14; West's Ann.Cal.Penal Code § § 12027, 12031.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, KENNEDY and HUG, Circuit Judges.

CHAMBERS, Circuit Judge:

Appellants Association of Orange County Deputy Sheriffs Robert Singer and Cliff Miller appeal from the district court's order granting summary judgment to appellees holding Cal.Penal Code § § 12031(b)(1) and 12027 do not grant entitlements sufficient to invoke the Due Process Clause of the Fourteenth Amendment.[1] The district court also rejected appellants' claim that their liberty interests were implicated and injured by appellees' action. We affirm.

Appellants, former deputy sheriffs retired under medical disability, brought suit under 42 U.S.C. § 1983 alleging they had been denied certificates allowing them, after retirement, to carry concealed and loaded weapons.[2] Appellants argue Cal.Penal Code § § 12031(b)(1) and

1) Plaintiff Byrd and White were dismissed by the trial court as their claims did not present a case or controversy within Article III. The propriety of their dismissal was not contested on appeal.
2) This court, as did the district court, assumes appellants are equal in status to those honorably discharged.

12027,[3] which provide for the certificates, create an

3) Cal.Penal Code § 12031 provides in relevant part.

12031. Carrying of loaded firearm; misdemeanor, exceptions (a)[Carrying a loaded firearm in a public place is a misdemeanor.]

(b) Subdivision (a) shall not apply to any of the following:

(1) Peace officers listed in Section 830.1 or 830.2, whether active or honorably retired. . .

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this paragraph. A retired peace officer shall petition the issuing agency for renewal of his or her privilege to carry a loaded firearm in public every five years. Any peace officer who has bee honorably retired shall be issued an identification certificate containing an endorsement by the issuing agency and indicating whether or not the retired peace officer has the privilege to carry a weapon pursuant to this paragraph and the date when the endorsement is to be reviewed again.

Section 12027 provides in relevant part:

12027. Persons exempt

Section 12025 [carrying a concealed weapon is a misdemeanor or felony] does not apply to or affect any of the following:

(a) Peace officers.

Peace officers listed in section 830.0 or 830.2 whether active or honorably retired. . .

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this subdivision.

entitlement sufficient to warrant constitutional protection.[4]

"A property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law." **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed 2d 548 (1972). This interest does not arise "whenever a person has only 'an abstract need or desire for' or 'unilateral expectation of,' a benefit." **Erdelyi v. O'Brian**, 680 F.2d 61, 63 (9th Cir. 1982) (quoting **Board of Regents v. Roth, supra**, 408 U.S. at 577, 92 S.Ct. at 2709). A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms. **See Griffeth v. Detrich**, 603 F.2d 118 (9th Cir. 1979),

cert. denied, 445 U.S. 970, 100 S.Ct. 1348, 64 L.Ed.2d 247 (1980).

The only restrictions imposed by § 12027(a) and § 12031(b)(1) are 1) the agency from which the officer retires issues a certificate indicating whether or not the officer may carry a concealed weapon[5] and 2) the privilege of

5) Appellants have received their certificates; their objection is the certificates expressly do not authorize the carrying of a concealed weapon.

4) The right of a retired deputy sheriff to carry concealed weapons is not so fundamental as to warrant constitutional protection apart from its status under state law **See Erdelyi v. O'Brian**, 680 F 2d 61 (9th Cir 1982)

carrying a loaded concealed weapon may be denied or revoked for "good cause".[6] This court finds, as did the court below, that the requirement of "good cause" prior to the denial of a weapons certificate does not create a constitutionally protected interest, because it is not a "significant substantive restriction on the basis for [the] agency's action." **Jacobson v. Hannifin**, 627 F.2d 177, 180 (9th Cir. 1980). **See also Erdelyi v. O'Brian, supra**, (private investigator did not have property interest in concealed weapons permit under Cal.Penal Code §12050).

Similarly, the court rejects appellants' argument that the denial of the exemption causes a loss of liberty without due process of law in that their reputations were damaged and alternative sources of employment were foreclosed. "Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor or integrity.' (Citations omitted). . .

When reasons are not given, inferences drawn from [denial of the exemption] alone are simply insufficient to implicate liberty interests." **Bollow v. Federal Reserve Bank of San Francisco**, 650 F.2d 1093, 1101 (9th Cir. 1981). Further, alternative sources of employment would not be foreclosed for failure to issue a certificate author-

6) Appellants were denied the privilege as contrasted to it being revoked. The court does not express an opinion with respect to the latter situation.

izing the carrying of a loaded concealed weapon as appellants can apply for such a permit under Cal.Penal Code § 12050 notwithstanding their success under the statutes at issue here.

Finally, appellants have moved to strike pages three and four of appellees' opening brief. That motion is granted as appellees' allegations are insufficiently set forth.[7]

AFFIRMED.

7) Appellants have also requested this court to remand the case so they can amend their complaint to allege additional facts. Because this decision is based on legal as opposed to factual issues, the request is denied.

APPENDIX B

RECEIVED
JUL 07 1982

FILED
JUL 2 1982
Clerk, U.S. District Court
Central District of California
Deputy

ENTERED
JUL 6 1982
Clerk, U.S. District Court
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, GEORGE BYRD, ROBERT SINGER, CLIFF MILLER, and JOHN WHITE,

Plaintiffs,

v.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE: AND COUNTY OF ORANGE,

Defendants.

NO. CV-82-59-MML

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The parties' cross-motions for summary judgment came on for hearing before the Court, the Honorable Malcolm M. Lucas, District Judge presiding, on April 5, 1982. After reading the briefs submitted by the parties, and considering the arguments of counsel, the Court took the motions under submission. Shortly thereafter, on April 8, 1982, the Court requested further briefing from the parties as to the standing of the Association of Orange County Deputy Sheriffs (AOCDS) to bring the instant action, and whether the claims of each of the individual plaintiffs presented a justiciable case or controversy, in light of their suggested non-residency in California. The parties submitted additional briefing on these issues on May 3, 1982, on which date the Court again took the matter under submission.

Plaintiffs brought suit under 42 U.S.C. §1983 alleging that they had been denied their constitutional rights to due process because they were denied certificates allowing them, after their retirement as deputy sheriffs, to carry concealed and loaded weapons. Plaintiffs motion for summary judgment argued that retired deputy sheriffs have a property right to the certificate allowing them to carry a concealed weapon, created by California statute, and that this property right was denied to them by defendants without due process of law. Plaintiffs urged the Court

to find as a matter of law that plaintiffs are entitled to the weapons certificates. Such a decision would leave only damage issues for trial. As to the standing issue raised by the Court, the plaintiffs state that AOCDS has standing to bring the instant action on behalf of its members. In addition, plaintiffs state that two of the four individual plaintiffs are California residents; the other two are out of state residents. The latter two plaintiffs still have an active case or controversy according to plaintiffs.

Defendants, in their motion for summary judgment, argue that the California statute cited by plaintiffs does not create a property right. Nor, defendants assert, do plaintiffs' rights otherwise rise to the level of a constitutionally protected property right. Since no property right is created, by statute or otherwise, the plaintiffs here, defendants conclude, are not entitled to due process in the denial of the concealed weapon certificates. In addition, defendants argue that plaintiffs were denied permits for good cause. Lastly, defendants state that California expressly made the denial of the weapons certificate a matter of discretion for the sheriff, and such a dicretionary act cannot be challenged under state law because there is absolute immunity for discretionary acts performed in the course of an official's duties.

As to the standing issues, defendants contend that AOCDS does not have standing to raise the claims asserted by the plaintiffs in this action. In addition,

although defendants do not contest the fact that two of the plaintiffs are California residents, defendants contend that the two non-resident plaintiffs' claims must be dismissed because their claims do not present a case or controversy. Lastly, defendants seized the opportunity for additional briefing to argue that both defendants should be dismissed from the action.

The Court finds that there is no issue that at least as to the two California resident plaintiffs, Singer and Miller, there is both standing and a case or controversy sufficient to satisfy Article 3 of the Constitution. AOCDS also, it seems to the Court, has standing to bring this action on behalf of its members.

As to plaintiffs Byrd and White, however, who are unquestionably out of state residents, the Court finds that their claims do not present a case or controversy and must therefore be dismissed by the Court. The statutes with which this suit is concerned govern the right to carry weapons in California. Plaintiffs Byrd and White are not in California and therefore the issue of their ability to obtain a weapon certificate in this stae is moot. The deprivation of property without due process claims of Byrd and White are therefore dismissed because they do not present a case or controversy.[1]

1) Byrd and White contend that they still have claims for infringement of their liberty interests. The Court notes that the complaint filed in this action does not allege infringement of such interests. In addition, as discussed below by the Court, to the extent plaintiffs have made claims of infringement of liberty interests, those claims are rejected on their merits by the Court.

Before proceeding to the merits of the motions for summary judgment, the Court notes that defendants, in their supplemental briefing of May 3, 1982, moved for dismissal of both defendants, the County of Orange and Brad Gates. The Court will not consider these arguments for dismissal, since they were not made in a properly filed motion which plaintiffs would have the opportunity to oppose.

The guarantee of procedural due process created by the Fourteenth Amendment applies only when a constitutionally protected liberty or property interest is at stake. **Board of Regents v. Roth**, 408 U.S. 564, 569 (1972). To have a property interest in a government benefit, plaintiffs must show a legitimate claim of entitlement, rather than an abstract need or desire for the claimed benefit. **Board of Regents v. Roth, supra**, 408 U.S. at 577. Such entitlements are created and defined by rules or understandings that stem from independent sources, such as relevant state or federal laws, regulations, ordinances, or express or implied contracts. **Bollow v. Federal Reserve Bank of San Francisco**, 650 F.2d 1093, 1098 (9th Cir. 1981), **cert. denied**, 50 U.S.L.W. 3669 (Feb. 22, 1982); **Russell v. Landrieu**, 621 F. 2d 1037, 1040 (9th Cir. 1980).

Here, plaintiffs claim their entitlement to a concealed weapons certificate is created by two California statutes,

California Penal Code § § 12027(a) and 12031(b)(1).[2] Those statutes read, in relevant part, as follows:

"12027. Persons exempt

Section 12025 [carrying a concealed weapon is a misdemeanor or felony] does not apply to or affect any of the following:

(a) **Peace Officers.**

(a) Peace officers listed in Section 830.1 or 830.2 whether active or honorably retired, other duly appointed peace officers, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at anytime subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this subdivision."

2) Plaintiffs never claim, and in facts expressly disclaim, any reliance on the federal constitution, Second Amendment. See Complaint, filed January 7, 1982; Plaintiffs' Memorandum of Points and Authorities to Motion for Summary Judgment, filed March 26, 1982, pp. 11-12.

"12031. Carrying of loaded firearms; misdemeanor; exceptions (a) [Carrying a loaded firearm in a public place is a misdemeanor]

(b) Subdivision (a) shall not apply to any of the following:

(1) Peace officers listed in Section 830.1 or 830.2, whether active or honorably retired, other duly appointed peace officers, full-time peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this paragraph. A retired peace officer shall petition the issuing agency for renewal of his or her privilege to carry a loaded firearm in public every five years. Any peace officer who has been honorably retired shall be issued an identification certificate containing an endorsement by the issuing agency and indicating whether or not the retired peace officer has the privilege to carry a weapon pursuant to this

paragraph and the date when the endorsement is to be reviewed again."

The Court finds that these two sections do not create an expectation of entitlement sufficient to create a property interest. A reasonable expectation of entitlement is determined largely by the language of a statute and the extent to which the entitlement is couched in mandatory terms. **See Griffeth v. Detrich**, 603 F.2d 118 (9th Cir. 1979), **cert. denied**, 445 U.S. 970 (1980). The only restrictions imposed by §§12027(a) and 12031(b)(1) are (1) that the agency from which the officer retires issue a certificate indicating whether or not the officer may carry a concealed weapon[3] and (2) that the agency may deny a retired officer a certificate for "good cause."[4] There is no definition of good cause, and no other details in the statutes which would limit the agency's discretion. This grant of extremely wide discretion to the involved agency defeats any expectation of entitlement under the statutes. **See Jacobson v. Hannifin**, 627 F.2d 177 (9th Cir. 1980). **See also, Erdelyi v. O'Brian**, 82 Daily Journal D.A.R. 1637 (9th Cir., June 21, 1982) (private investigator did not have

3) Plaintiffs have received their certificates; their objection is that the certificates expresly do not authorize the carrying of a concealed weapon.

4) Only active or honorably retired officers are covered by §§12027(a) and 12031(b)(1). The parties dispute the issue of whether the individual plaintiffs here are honorably discharged. The Court has assumed, for the purposes of these motions, that plaintiffs are honorably discharged officers.

property interest in concealed weapons permit under Cal.Penal Code § 12050).

Plaintiffs argue that because a weapons certificate may be denied only on good cause, there are factual issues as to whether good cause here was shown, as to whether the agency's discretion was exercised, and whether that discretion was exercised in good faith. Plaintiffs are arguing that, in essence, there is a separate protectable interest created by the statutes' use of "good cause". The Court finds that the requirement of "good cause" prior to the denial of a weapons certificate does not create a constitutionally protected interest, because it is not a "significant substantive restriction on the basis for [the] agency's actions." Jacobson v. Hannifin, supra, 627 F.2d at 180. This Court cannot and will not review the grounds for the denial of the certificate where there is no due process right involved; these issues of fact do not, therefore, preclude, summary judgment on the legal grounds reviewed above.

Plaintiffs also claim that their liberty interests have been implicated and injured by defendants' actions. There are no allegations in plaintiffs' complaint of loss of a liberty interest; plaintiffs have, however, raised such allegations in the motions before the Court: "the protected 'liberty' interest which is brought into play by the stigma which results from the allegations brought against the individual plaintiffs herein." Plaintiffs' Memorandum of Points and Authorities to Motion for Summary Judg-

ment, filed March 26, 1982, p. 7. **See also id.**, pp. 12-13, 20.[5]

The Supreme Court has held, however, that a liberty interest is not infringed when the only loss suffered at the hands of the government is a stigma or damage to reputation. **Paul v. Davis**, 424 U.S. 693 (1976). Here, plaintiffs have not been deprived of any tangible loss nor subjected to alteration of some right or status recognized and protected by state laws. **See** discussion **supra**. They cannot, therefore, claim infringement of a liberty interest as a result of the denial of a certificate to carry a concealed weapon.

5) Plaintiffs do not identify any "allegations" made by defendants. Plaintiffs introduce declarations in which the declarant states that the normal inference of persons within the "police community" when told of a retired officer refused a weapons certificate would be that the retired officer had a mental disorder or had undergone a "stress retirement." **See, e.g.**, declarations of: Ken Harris, filed April 30, 1982; Dave Baca, filed March 23, 1982; Al Angeles, filed March 22, 1982. **See also** the individual plaintiffs' declarations that they were embarrassed to explain the "circumstances of their retirement certificate" to others; declarations of Robert Singer, Cliff-Miller, filed January 7, 1982.

Further, even if plaintiffs' alleged liberty interest was linked to a protectable property interest, the Court would find as a matter of law that the plaintiffs' liberty interests were not infringed by defendants. The stigma which infringes a liberty interest is that which "seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities.. . ." **Jablon v. Trustees of California State Colleges**, 482 F.2d 997, 1000 (9th Cir. 1973), **cert. denied**, 414 U.S. 1163 (1974). Here, there are no "charges" which reach the level of accusations of moral turpitude such as dishonesty or immorality. Even if it is assumed that the sheriff made a public declaration that the plaintiffs were denied weapons certificates for "good cause," (see, however, below), the charges would not reach the level of severity at which it could be said they infringed constitutional liberty interests. **See, e.g., Stretten v. Wadsworth Veterans Hospital**, 537 F.2d 361 (9th Cir. 1976) (termination from federal job for incompetence and inability to deal with co-workers does not infringe liberty interests); **Gray v. Union County Intermediate Education District**, 520 F.2d 803 (9th Cir. 1975) (public teacher's contract not renewed because of interference with another agency and poor student and parent relations). **See also, Erdelyi v. O'Brian**, 82 Daily Journal D.A.R. 1637 (9th Cir., June 21, 1982) (liberty interest not infringed by denial to private investigator of concealed

weapons license). **Cf. Vanelli v. Reynolds School Dist. No. 7**, 667 F.2d 773 (9th Cir. 1982) (teacher terminated in mid-year on grounds of immoral conduct; implicated both property and liberty interests).

In addition, there has been no public disclosure of why plaintiffs did not receive weapons certificates. The "inferences" that may be drawn by others from the bare issuance of the plaintiffs' retirement certificates (without weapons certification) is not sufficient to implicate liberty interests. As the Ninth Circuit stated in **Bollow v. Federal Reserve Bank of San Francisco**, 650 F.2d 1093, 1101 (9th Cir. 1981), **cert. denied**, 50 U.S.L.W. 3669 (Feb. 22, 1982) (internal citations omitted):

> "Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor or integrity'...When reasons are not given, inferences drawn from dismissal [or denial] alone are simply insufficient to implicate liberty interests."

Plaintiffs cannot show that they should prevail on their claims. Summary judgment is therefore granted to defendants as to each plaintiff, on all claims. The plaintiffs, in their opposition to the defendants' Motion for Summary Judgment, argue that they need more time for discovery prior to resolution of the issues presented in that motion. However, none of the issues decided above is decided on the basis of disputed facts; in every instance the Court has

accepted all of plaintiffs' allegations as true, and has denied the claims on legal grounds. By reason of the foregoing disposition, plaintiffs' motion for summary judgment is denied in its entirety.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: July 2, 1982

Malcolm M. Lucas
United States District Judge

APPENDIX C

Robert MONZINGO, Petitioner and Respondent,

v.

CITY OF GARDEN GROVE, et al., Respondents and Appellants.

Civ. 28354.

Court of Appeal, Fourth District, Division 1.

March 23, 1983.

Rehearing Denied April 12, 1983.

As Modified April 12, 1983.

Hearing Denied May 25, 1983.*

Honorably retired peace officer petitioned the Superior Court, Orange County, James W. Cook, J., for a writ of mandate to compel the chief of police and the city to provide him with a written statement of the reasons why the endorsement to his identification certificate as a peace officer authorizing him to carry a concealed firearm was revoked. After the requested relief was granted, the city appealed. The Court of Appeal, Cologne, Acting P.J., held

*In denying hearing, the Supreme Court ordered that the opinion be not officially published.

that the honorably retired peace officer was entitled to written notice and a statement of the reasons for the revocation of his privilege to carry a concealed weapon and, upon request, was entitled to a full and fair hearing.

Affirmed as modified.

1. Weapons - 11(1)

Any active or honorably retired city police officer has legitimate claim of entitlement to privilege to carry concealed weapon. West's Ann. Cal. Penal Code §12027.

2. Constitutional Law - 254.1

Where individual is subjected to deprivatory governmental action he has liberty interest in fair and unprejudicial decision making and in being treated with respect and dignity. U.S.C.A. Const. Amends. 5, 14.

3. Constitutional Law - 274(2)

Due process attends the deprivation of the statutory privilege of a city peace officer to continue with lawful self-protective ability to carry concealed firearm after his retirement. West's Ann. Cal. Penal Code §12027; U.S.C.A. Const. Amends. 5, 14.

4. Weapons - 11(1)

Privilege of active or honorably retired peace officer to carry concealed weapon is not the kind of statutory benefit which entails loss of liberty or basic human rights and, therefore, denial of that privilege requires written notice of proposed action and basis upon which action rests and, upon request, a hearing at which honorably retired peace

officer would be confronted with evidence of reasons for action and opportunity to present his own evidence.

Eric Lauterer, City Atty., for respondents and appellants.

Silver & Kreisler and Stephen H. Silver, Santa Monica, for petitioner and respondent.

COLOGNE, Acting Presiding Judge.

Robert Monzingo petitioned the superior court for a writ of mandate to compel Frances Kessler, the Chief of Police of the City of Garden Grove (Chief), and the City of Garden Grove (City) to provide him with a written statement of the reasons why the endorsement to his identification certificate as a peace officer authorizing him to carry a concealed firearm was revoked. He also requested he be given an opportunity to respond to said written statement at an evidentiary hearing at which the burden of proof would be placed on the Chief and the City. The Superior Court granted the requested relief, and the City appeals.

Mozingo is a former Garden Grove police officer who was disabled by reason of an industrial injury and retired.

In conjunction with his retirement, Monzingo requested his I.D. be endorsed to authorize him to carry a concealed firearm pursuant to Penal Code[1] section 12027. The

1) All statutory references are to the Penal Code unless otherwise specified.

request was denied. On October 31, 1980, Monzingo's attorney wrote the Chief demanding a written statement of the reasons for the denial and an opportunity to respond. On November 12, 1980, the Chief, with staff members and Monzingo's attorney present, orally discussed the matter with Monzingo and explained that in light of the medical reports he had received in connection with the disability claim, he was satisfied good cause existed to deny the request. On November 17, Monzingo filed a declaration in response to the reasons given orally. This declaration was received by the Chief who declined to reconsider his decision or cause a hearing to be held.

The Chief was not explicit nor would he clarify the exact reasons for denial of the permit. The Superior Court made the following order granting the writ:

> "1. A Peremptory Writ of Mandate shall issue commanding Respondents, and each of them, to provide to Petitioner (a) a written statement of the specific reasons why Respondents seek to revoke and/or deny his endorsement to carry a concealed weapon pursuant to Section 12027 of the California Penal Code; (b) copies of all materials relied upon in support of that action; (c) an opportunity to respond thereto at a full and fair evidentiary hearing before an impartial body at which the burden of proving the truth of the

reasons for the action shall rest with Respondents; and (d) a written statement of the resulting decision, including the reasons in support thereof."

Under Penal Code section 12025, every person who carries a concealable firearm without having obtained a license is guilty of a misdemeanor. Section 12050 authorizes the chief of police of a city to issue such a license on specified conditions. It is significant, however, that section 12027, subdivision (a), exempts all active and honorably retired city police officers from the prohibition of section 12025, and thus the licensing requirement, but provides:

"The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at anytime subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this subdivision."

The section thus authorizes the "agency from which a peace officer is honorably retired," not the chief of police, to deny the exemption. The Penal Code gives us no assistance in determining which particular agency it refers to but it must, of necessity, exclude the chief of police because of the distinction made in the language of these otherwise related sections. We believe it refers to the city since a city is normally considered an entity which "agency" suggests. A department is simply a part of the

functioning "agency" (see 3 Ops.Atty.Gen. 234, asserting the water department of the City of Long Beach is not a public agency within the meaning of the Public Employees Retirement Law, since it has no existence independent of the city itself). For retirement purposes, the Government Code provides some assistance. The members of the police department are employees of a public agency (see Gov.Code, § § 20009) and it is the city which is the contracting agency from which an employee would retire (see Gov.Code, § 20020). For these reasons, we believe only the City can deny or revoke the retired police officer's exemption from the licensing requirement.

Here, the Police Chief, acting as such, denied the request and we hold he does not have that authority under the law. The determination whether good cause exists to deny Monzingo's right to exemption from the concealed firearms licensing laws rests with the city council.

[1-3] The Legislature has given city police officers, as well as retired city police officers, this exemption, a statutory privilege. By the language of the statute, it may only be taken from them on a showing of "good cause." Certainly, any active or honorably retired city police officer under these provisions has "a legitimate claim of entitlement to" the privilege (see **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548). Procedural safeguards required for the protection of an individual's statutory interests must be analyzed in the

context of the principle that freedom from arbitrary adjudicative procedure is a substantive element of one's liberty. This approach presumes that where an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudicial decision-making and in being treated with respect and dignity (**People v. Ramirez**, 25 Cal.3d 260, 268, 158 Cal.Rptr. 316, 599 P.2d 622). Likewise, it is held that "when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process" (**Skelly v. State Personnel Board**, 15 Cal.3d 194, 207, 124 Cal.Rptr. 14, 539 P.2d 774); and "[s]uspension of a right or of a temporary right of enjoyment may amount to a 'taking' for 'due process purposes'" (**Civil Service Assn. v. City and County of San Francisco**, 22 Cal.3d 552, 560, 150 Cal.Rptr. 129, 586 P.2d 162). Under either the "liberty" or the "property" theory, from the governmental and private interests at stake here, it is quite clear due process attends the deprivation of the statutory privilege of a city police officer to continue his lawful self-protective ability to carry a concealed firearm after his retirement (see **People v. Ramirez, supra**, 25 Cal.3d at pp. 264, 266-269, 158 Cal.Rptr. 316, 599 P.2d 622). The only remaining question is "what process is due?" (**Civil Service Assn. v. City and County of San Francisco, supra**, 22 Cal.3d 552, 560, 150 Cal.Rptr. 129, 586 P.2d 162).

Due process is flexible and calls for such procedural protection as the particular situation demands (**Morrissey v. Brewer**, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; **People v. Ramirez, supra**, 25 Cal.3d at p. 268, 158 Cal.Rptr. 316, 599 P.2d 622). The procedure held necessary in protecting a criminal's liberty interest in avoiding loss of good time credits or solitary confinement is advance written notice of the claimed violation, a written record of the proceedings including a statement by the fact finders as to the evidence relied on and the reasons for the action taken, and the right to call witnesses and present documentary evidence in his defense (see **Wolff v. McDonnell**, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935). By contrast, the due process required for a ten-day suspension of a child from school would require only notice and a chance to respond (**Goss v. Lopez**, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725).

> "More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental

official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (**People v. Ramirez, supra,** 25 Cal.3d 260, 269, 158 Cal.Rptr. 316, 599 P.2d 622.)

[4] In applying this analysis here, we believe the privilege to carry a concealed firearm is not the kind of statutory benefit which entails loss of liberty or basic human rights. We recognize, however, while self-protection is important, the need for it does not necessarily follow from service in the police force and nothing in this proceeding legally precludes the retired officer from seeking to obtain the license under the regular procedures for obtaining a license accorded every citizen (§ 12050 et seq.). On the other hand, the denial of the statutory privilege of a retired officer to carry a concealed firearm for his own protection, particularly when it is based on certain medical reports, carries a stigma of mental instability which could cause serious damage to one's reputation and acceptance in the community (see **Wisconsin v. Constantineau,** 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515).

The denial of this important interest given by legislative fiat at least demands written notice of the proposed action and the basis upon which the action rests, and upon request a hearing where the honorably retired police officer will be confronted with evidence of the reasons for the ac-

tion and an opportunity to present his own evidence, including documentation in contravention of the charges. The statute makes clear the agency can only deny the exemption for "good cause" and there must be an appropriate record in support of those reasons for proper review showing good cause does exist.

Under the statute, the decision must be made by the agency, however, and the trial court's order that the decision should be made by "an impartial body" is not acceptable. The law gives the decision-making function to the city council.[2] It should provide for notice and, if requested, a hearing.

The record of the proceedings must contain substantial evidence to support its decision. The burden of proof does not necessarily fall upon the city; anyone who might be interested in seeing that the privilege is denied, including the Chief of Police, might appear and present evidence showing "good cause" for the denial of revocation.

Paragraph 1(c) of the order of the superior court granting a peremptory writ of mandate is modified to state: (c) an opportunity to respond at a full and fair hearing before the City of Garden Grove, the record of

2) We do not suggest by this opinion that the hearing must be conducted by the City (see Gaylord v. City of Pasadena, 175 Cal. 433, 436-437, 166 P.348; Subriar v. City of Bakersfield, 59 Cal.App.3d 175, 204-205, 130 Cal.Rptr. 853). It may, by ordinance, delegate this function to "an impartial body," but the record before us does not reflect such a delegation has been made.

which shall support a finding of good cause for denial of the privilege to carry a concealed firearm, pursuant to section 12027, if that be the City's decision.

In all other respects, the order appealed is affirmed. Each of the parties shall bear his own costs of appeal.

STANIFORTH and WIENER, J.J., concur.

Hearing denied; MOSK, J., dissenting.

APPENDIX D

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX F

§ 12027. [Persons excepted from prohibition against carrying certain firearms without license] Section 12025 does not apply to or affect any of the following:

(a) Peace officers lised in Section 830.1 or 830.2 whether active or honorably retired, other duly appointed peace officers, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at anytime subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this subdivision.

A retired peace officer who retired after January 1, 1981, shall petition the issuing agency for renewal of his or her privilege to carry a concealed firearm every five years. Any peace officer who has been honorably retired shall be issued an identification certificate containing an endorsement by the issuing agency indicating whether or not the retired peace officer has the privilege to carry a weapon pursuant to this subdivision and where the officer retired after January 1, 1981, the date when the endorsement is to be reviewed again.

(b) The possession or transportation by any merchant of unloaded firearms as merchandise.

(c) Members of the Army, Navy, or Marine Corps of the United States, or the National Guard, when on duty, or organizations which are by law authorized to purchase or receive such weapons from the United States or this state.

(d) Duly authorized military or civil organizations while parading, or the members thereof when going to and from the places of meeting of their respective organizations.

(e) Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

(f) Members of any club or organization organized for the purpose of practicing shooting at targets upon established target ranges, whether public or private, while such members are using any of the firearms referred to in this chapter upon such target ranges, or while going to and from such ranges.

(g) Licensed hunters or fishermen while engaged in hunting or fishing, or while going to or returning from such hunting or fishing expedition.

(h) Members of any club or organization organized for the purpose of collecting and displaying antique or historical pistols, revolvers or other firearms, while such members are displaying such weapons at meetings of such clubs or organizations or while going to and from such meetings, or individuals who collect such firearms not designed to fire, or incapable of firing fixed cartridges or fixed shot shells, or other firearms of obsolete ignition type for which ammunition is not readily available and which are generally recognized as collector's items, provided such firearm is kept in the trunk. If the vehicle is not equipped with a trunk, such firearm shall be kept in a locked container in an area of the vehicle other than the utility or glove compartment. [1953 ch 36 § 1; 1959 ch 1854 § 1; 1953 ch 1677 § 1; 1965 ch 281 § 2; 1968 ch 1222 § 61; 1969 ch 1012 § 1; 1974 ch 1090 § 1; 1980 ch 1340 § 24, effective September 30, 1980; 1981 ch 32 § 2, effective May 14, 1981.] 21 Cal. Jur. 3d Criminal Law § 2425.

APPENDIX G

§ 12031. [Carrying loaded firearm in public place or street] (a) Except as provided in subdivision (b), (c), or (d), every person who carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor.

Every person convicted under this section who has previously been convicted of an offense enumerated in Section 12001.6, or of any crime made punishable under this chapter, shall serve a term of at least three months in the county jail, or, if granted probation, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned for a period of at least three months.

The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this subdivision, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by such a disposition.

(b) Subdivision (a) shall not apply to any of the following:

(1) Peace officers listed in Section 830.1 or 830.2, whether active or honorably retired, other duly appointed peace officers, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any such officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting such officer.

The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a weapon as provided in this paragraph. A retired peace officer shall petition the issuing agency for renewal of his or her privilege to carry a loaded firearm in public every five years. Any peace officer who has been honorably retired shall be issued an identification certificate containing an endorsement by the issuing agency indicating whether or not the retired peace officer has the privilege to carry a weapon pursuant to this paragraph and the date when the endorsement is to be reviewed again.

(2) Members of the military forces of this state or of the United States engaged in the performance of their duties.

(3) Persons who are using target ranges for the purpose of practice shooting with a firearm or who are members of shooting clubs while hunting on the premises of such clubs.

(4) The carrying of concealable weapons by persons who are authorized to carry such weapons pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(5) Armored vehicle guards, as defined in Section 7521 of the Business and Professions Code, (A) if hired prior to January 1, 1977; or (B) if hired on or after such date, if they have received a Firearms Qualification Card from the Department of Consumer Affairs, in each case while acting within the course and scope of their employment.

(c) Subdivision (a) shall not apply to any of the following who have completed a regular course in firearms training approved by the Commission on Peace Officer Standards and Training:

(1) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also under the express terms of the charter (i) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (ii) must be not less than 18 years of age nor more than 40 years of age, (iii) must possess physical qualifications prescribed by the commission, and (iv) are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by the police commission.

(2) The carrying of weapons by animal control officers or zookeepers, regularly compensated as such by a governmental agency when acting in the course and scope of their

employment and when designated by a local ordinance or, if the governmental agency is not authorized to act by ordinance, by a resolution, either individually or by class, to carry such weapons, or by persons who are authorized to carry such weapons pursuant to Section 607f of the Civil Code, while actually engaged in the performance of their duties pursuant to that section.

(3) Harbor policemen designated pursuant to Section 663.5 of the Harbors and Navigation Code.

(d) Subdivision (a) shall not apply to any of the following who have been issued a certificate pursuant to Section 12033. Such certificate shall not be required of any person who is a peace officer, who has completed all training required by law for the exercise of his or her power as a peace officer, and who is employed while not on duty as such peace officer.

(1) Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

(2) Guards of contract carriers operating armored vehicles pursuant to California Highway Patrol and Public Utilities Commission authority (i) if hired prior to January 1, 1977; or (ii) if hired on or after January 1, 1977, if they have completed a course in the carrying and use of firearms which meets the standards prescribed by the Department of Consumer Affairs.

(3) Private investigators, private patrol operators, and alarm company operators who are licensed pursuant to Chapter 11 (commencing with Section 7500) of Division 3 of the Business and Professions Code, while acting within the course and scope of their employment.

(4) Uniformed security guards or night watchmen employed by any public agency, while acting within the scope and in the course of their employment.

(5) Uniformed security guards, regularly employed and compensated as such by persons engaged in any lawful business, and uniformed alarm agents employed by an alarm company operator, while actually engaged in protecting and preserving the property of their employers or on duty or en route to or from their residence of their place of employment. Security guards and alarm agents en route to or from their residence or employer-required range training. Nothing in this paragraph shall be construed to prohibit cities and counties from enacting ordinances requiring alarm agents to register their name.

ed pursuant to Chapter 11 (commencing with Section 7500) of Division 3 of the Business and Professions Code while acting within the course and scope of their employment as private patrolmen or private investigators.

(e) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city

or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to the provisions of this section constitutes probable cause for arrest for violation of this section.

(f) As used in this section "prohibited area" means any place where it is unlawful to discharge a weapon.

(g) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case which holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(h) Nothing in this section shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by such person for lawful purposes connected with such business, from having a loaded firearm within such person's place of business, or any person in lawful possession of private property from having a loaded firearm on such property.

(i) Nothing in this section shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, during such time and in such area as the hunting is not prohibited by the city council.

(j) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of such weapon is necessary for the preservation of such person or property. As used in this subdivision "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

(k) Nothing in this section is intended to preclude the carrying of a loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest.

(l) Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.[1967 ch 960 § 1; 1968 ch 1222 § 62; 1969 ch 1164 § 1; 1970 chs 938 § 1, 1292 § 2; 1972 ch 579 § 39; 1974 ch 1090 § 2; 1975 ch 1170 § 1, operative January 1, 1977; 1976 ch 1426 § 4; 1978 ch 1023 § 4; 2979 ch 296 § 5, effective July 25, 1979; 1980 ch 1340 § 25, effective September 30, 1980; 1981 ch 1065 § 1; 1982 ch 136 § 9, effective March 25, 1982, operative April 24, 1982, ch 1262 § 23.] **21 CAL JUR 3D Criminal Law § 2428.**

APPENDIX H

DIVISION III

Rules for Publication of Appellate Opinions

Adopted by the Supreme Court of the State of California, effective January 1, 1964

Rule 976. [Publication of appellate opinions]

(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule,[1] (2) involves a legal

1) This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation.

issue of continuing public interest,[2] or (3) criticizes existing law.[3] [As amended effective January 1, 1972; previously amended effective November 11, 1966.]

2) This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

3) This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature.

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YR.	J	N/S	O	Ptf	Def	R
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TITLE:
DEPUTY SHERIFFS ORANGE CO ASSN-V-GATES
CAUSE:
COMPLT FOR DECLARATORY JUDGMNT MML(kx)
ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, GEORGE BYRD, ROBERT SINGER, CLIFF MILLER and JOHN WHITE,

Plaintiffs,

v.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE; and COUNTY OF ORANGE,

Defendants.

GREGORY G. PETERSEN
600 WEST SANTA ANA BLVD, STE 900
SANTA ANA, CA 92701
(714) 667-8071

GREGORY G. PETERSEN
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(714) 667-8071
Edward N. Duran Deputy Co. Cnsl
10 Civic Ctr Plaza
P.O.Box 1379
Santa Ana, CA 92702
(714) 834-6612 (for all defts)

CV82-0059-MML (Kx)
ASSOC. OF ORANGE COUNTY DEPUTY SHERIFFS, et al., V. BRAD GATES, et al.

1/7/82	ag	1. Fld cmplt. Issd sms. Case may be referred to Mag Kronenberg fr discvry.
		2. Fld pltf declratn of Cliff Miller in supp of motn for prelim inj
		3. Fld pltf P&A's in supp of motn for prelim inj.
		4. Fld pltf declratn of Robert Singer in supp of motn for prelim inj.
		5. Fld pltf notc of motn retnbl 2/1/82 10AM & motn for prelim inj.

1/15/82	sb	6. Fld deft opp to motn fr prelim inj
1/20/82	cw	7. Fld pltfs reply to opp to mtn for prelim inj.
		8. Fld declar of Al Angele.
		9. Fld declar of Michael Stover.
		10. Fld declar of Glenn Clary.
		11. Fld declar of Robert Singer.
		12. Fld declar of Gregory G. Petersen.
1/28/82	lpc	13. Fld defts' ANSWER TO COMPLT.
*1/21/82	cw	14. Fld declar of Wendell Phillips.
		15. Fld declar of Les Robbins.
1/26/82	cw	16. Fld defts ntc of requirement of personal presence of affiants.
		17. MIN ORD:Hrg pltfs ex parte appl for excusal of affiants fm hrg of the mtn for prelim inj. Hrg held, appl granted & the 2 affiants are excused. Deft is to file written opp to their affids by 1-28-82 & pltf is to reply by 2-1-82, 10am.
*1/25/82	cw	18. Fld pltfs ex parte appl for relief of presence of affiants or alt mtn to cont hrg.
		19. Fld pltfs advise of notification of opp cnsl.
1/27/82	cw	20. Fld ORD excusing affiants Phillips & Angele fm appear on 2-1-82, 10am.

1/28/82	cw	21. Fld defts objs to the declars of Phillips & Angele.
2/1/82	cw	22. Fld pltfs opp to defts objs to declars.
2/3/82	cw	23. Fld ORD denying pltfs mtn for prelim inj.
*2/1/82	cw	24. MIN ORD: Pltfs mtn for prelim inj taken under submission.
2/5/82	cw	25. Fld proof of svc of ntc of mtn & mtn for prelim inj; P&A in suppt., etc. on Brad Gates exec 1-11-82.
2/12/82	sb	26. Fld Ord re early meeting cnsl Mandatory Status conf 5-17-82 10am
3/4/82	cw	27. Fld cnsls' report to court pur to LR 9.2.7.
3/10/82	cw	28. Fld pltfs proof of svc of reply to opp to mtn for p/i, etc.
3/12/82	cw	29. Fld defts ntc of mtn & mtn rtnbl 4/5/82, 10am for s/j; memo of P&A in suppt.
		30. Fld pltfs ntc of mtn & mtn rtnbl 4/5/82, 10am for s/j.
		31. Fld pltfs P&A in suppt of mtn for s/j.
3/15/82	cw	LODGED defts prop ord.
		LODGED defts prop findings.
3/22/82	cw	LODGED pltfs prop jdmt.

*3/19/82	cw	32. Fld defts ntc of requirement of personal presence of affiants.
		33. Fld defts opp to pltfs mtn for s/j.
3/22/82	cw	34. Fld pltfs declar of Gregory Petersen.
		35. Fld pltfs proof of svc of ntc of mtn & mtn for s/j etc.
		36. Fld pltfs stmt of genuine issues.
		37. Fld pltfs declar of Al Angele.
3/23/82	cw	38. Fld pltfs declar of Dave Baca.
		39. Fld pltfs reply to detfs opp to pltfs mtn for s/j.
3/24/82	cw	40. Fld defts reply to pltfs opp to defts mtn for s/j.
3/26/82	cw	41. Fld pltfs memo of P&A to mtn for s/j.
4/5/82	cw	42. MIN ORD: Mtns for s/j argued & taken under subm.
4/8/82	cw	43. Fld ORD (MML) re fur briefing on cross mtn for s/j.
5/3/82	cw	44. Fld defts fur brief on cross mtn for s/j.
		45. Fld declar of Johnson.
		46. Fld declar of MacLeod.
		47. Fld pltfs P&A in support of standing by AOCDS & indiv pltfs.
		48. Fld pltf's declaratn of Ken Harris.

5/11/82	cw	49. MIN ORD: Man stat conf contd to 6/14/82, 10am.
6/11/82	cw	50. Fld STIP & ORD (MML) contg Man stat conf to 8/2/82, 10am.
7/2/82	rlb	51. Fld ORD Granting dfts' mot for S/J. (Ent 7/6/82 m/cpys & ntfd prtys) JS-6
7/26/82	cw	53. Fld trans desig & ord form.
11/4/82	am	Fld orig rptrs trans of proc had on 4/5/82.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

Assoc of Orange County Deputy Sheriffs, et al.

DEFENDANT

Brad Gates, et al.

DOCKET NO. 82-0059-MML (Kx)

Page 3 of pg.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

Assoc of Orange County Deputy Sheriffs, et al.

DEFENDANT

Brad Gates, et al

DOCKET NO. 82-0059-MML (Kx)

Page 3 of pg

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On December 22, 1983, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of two (2) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

ADRIAN KUYPER
County Counsel
EDWARD DURAN
Deputy County Counsel
10 Civic Center Plaza
P. O. Box 1379
Santa Ana, California 92702-1379

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on December 22, 1983, at Riverside, California.

JACK GALLAGHER

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Office - Supreme Court, U.S.
FILED
MAR 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1145

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

EDWARD N. DURAN,
Deputy County Counsel,
Member of the Bar,
U.S. Supreme Court,
10 Civic Center Plaza,
Santa Ana, Calif. 92702-1379,
(714) 834-6612,
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the grant of summary judgment by the United States District Court for the Central District of California holding that California statutes did not create an entitlement sufficient to warrant protection under the United States Constitution?

2. Is a Federal Court bound by an unpublished decision which is not binding on any state court?

3. Does the Doctrine of Comity require abstention where the party has previously exhausted his state remedies or concurrence with an unpublished decision which is not binding on any court?

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No. 83-1145

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Brad Gates and the County of Orange pray that the Petition for Writ of Certiorari be denied.

Constitutional and Statutory Provisions Involved.

In addition to those cited by the Petitioner, Respondents cite: California Rules of Court, Rule 977;[1] California Business and Professions Code, Section 6076, Rule 17.[2]

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[1]California Rules of Court, Rule 977 (hereinafter referred to as "Rule 977"); Appendix 1 hereto.

[2]California Business and Professions Code, Section 6076, Rule 17; Appendix 2 hereto.

Statement of the Case.

After unsuccessfully pursuing the matter in the California State Trial Court,[3] Petitioner filed the instant case in the United States District Court for the Central District of California (hereinafter "District Court"), moving for a preliminary injunction under the Fourteenth Amendment of the United States Constitution and filing a complaint for declaratory judgment, preliminary injunction, injunction, and damages.[4]

The District Court denied Petitioner's motion for preliminary injunction[5] and cross motions for summary judgment were filed.[6] On July 6, 1982, the District Court dismissed two named plaintiffs because their claims did not present a case or controversy within Article III, Section 2, Clause 1 of the United States Constitution[7] and granted summary judgment in favor of Respondents.[8] On July 16, 1982, a notice of appeal was filed[9] and, after written briefs were filed and oral argument had on May 3, 1983, the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") affirmed the District Court's grant of summary judgment on September 23, 1983.[10]

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[3]*Association of Orange County Deputy Sheriffs, et al. v. Brad Gates, etc., et al.*, Orange County Superior Court Case No. 34-18-22, filed September 17, 1980. In this State case there were six named plaintiffs and, when originally filed in the U.S. District Court below, there were five named plaintiffs. At all times the Petitioner, Robert Singer, has remained a named plaintiff; therefore, herein the term "Petitioner" will be used unless otherwise noted.

[4]U.S. District Court Docket Entry (hereinafter "D.E.") 1.

[5]D.E. 23.

[6]D.E. 29, 30, 31, 33, 39, 40, 41, 44, and 47.

[7]*Association of Orange County Deputy Sheriffs v. Gates* (1983), 716 F.2d 733 (hereinafter referred to as "*Gates*") at 733, fn. 1; D.E. 51, pp. 3-4.

[8]*Gates, supra*, at 733; D.E. 51.

[9]D.E. 52.

[10]*Gates, supra*, at 735.

Both the District Court and the Ninth Circuit accepted all of Petitioner's allegations as true[11] and found that the statutes involved[12] did not create an expectation sufficient to create a constitutionally protected property interest[13] and, even if a protectable property interest were found, there was no infringement of a constitutionally protected liberty interest.[14]

Respondents do not agree with and object to the last three paragraphs[15] of Petitioner's "Statement of the Case." Respondents suggest that these paragraphs are not a statement of the case but are argument. Further, the statements therein are not supported by the record. Petitioner has set forth numerous allegations as facts, which are set forth only in declarations which the Court treated, for the purposes of summary judgment, as true. Yet the Courts below, assuming such declarations as true, did not find any publication, allegations, or stigmatization on the part of Respondents.[16]

Respondents request that this Court strike these paragraphs on the basis that they are argument and not a Statement of the Case supported by the record.

Summary of Argument.

Petitioner's request for certiorari is based upon an unpublished, non-precedential decision of the California Court of Appeal which may not be cited by a court or a party and is not binding on any court.

While this issue was not addressed in the published decision of the Ninth Circuit, the issue was orally argued

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[11]*Gates, supra*, at 733, fn. 2 and 735, fn. 7; D.E. 51 at p. 7, fn. 4, and p. 11.

[12]California Penal Code Sections 12027 and 12031.

[13]*Gates, supra*, at 734; D.E. 51, pp. 7-8.

[14]*Gates, supra*, at 734; D.E. 51, pp. 8-10.

[15]Petition for Writ of Certiorari filed on December 22, 1983 (hereinafter "Petition"), pp. 4-7.

[16]*Gates, supra*, at 734; D.E. 51, pp. 8-11; D.E. 23, p. 2.

before the Ninth Circuit and subsequently addressed in letters to the Ninth Circuit panel when the California Supreme Court later ordered the case depublished.

Petitioner in the present case attempts to argue that a case that has *no precedential* value, is *not binding* on *any* court, and that *may not be cited* by a court or by a party, is of some value.

There is no question that the depublished opinion of the California Court of Appeal[17] did not qualify for any form of publication or use under California Rules of Court 976(b),[18] since it was the decision of six out of seven members of the California Supreme Court that such opinion was of so little value and legal reasoning that it should be depublished.[19]

Petitioner's arguments concerning important questions of Federal law, entitlement and the Doctrine of Comity, were all before the Ninth Circuit and District Court. By this action Petitioner is only rearguing the same legal and factual issues presented to the District Court and the Ninth Circuit. This Court should not entertain reargument and rehashment of the same trite arguments already put forth by Petitioner. This is especially repugnant when the principal reason that Petitioner sets forth for a writ of certiorari is a case that has been *depublished* and cannot, therefore, be cited by a court or an attorney for *any* precedential value.

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[17]Unpublished opinion of Division I of the Fourth District California Court of Appeal; see Petition, Appendix C, pp. 52-62. Since citation of this unpublished opinion is prohibited by California statutes, rules and decisions, it will be referred to herein as "unpublished opinion."

[18]Petition, Appendix H.

[19]Minutes of the California Supreme Court, May 25, 1983, in 4 Civ. 28354, Div. 1, California Official Reports, No. 16, June 16, 1983, Minutes, p. 38.

ARGUMENT.

The Criteria Set Forth by This Court Governing Review of Certiorari Has Not Been Met.

In Rule 17.1 of Rules of the Supreme Court of the United States, this Court has indicated the character of reasons that will be considered in determining whether to grant certiorari. While this criteria does not control nor fully measure this Court's discretion, the instant Petition does not fall within the reasons set forth.

The decision of *Gates, supra,* (1) is not in conflict with the decision of any other Federal Court of Appeals on the same subject and has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, (2) has not decided a Federal question in a way in conflict with the state court of last resort, nor (3) decided a Federal question in conflict with this Court's decisions.

Petitioner has attempted to characterize the court's decision in *Gates, supra,* as both (a) contravening the interpretation of identical statutes by the Fourth District of the California Court of Appeal, and (b) in conflict with the applicable decisions of this Court and other Federal circuits. This is patently untrue as a review of the record will show.

In so characterizing, Petitioner attempts to bring before this Court, in contravention of Rule 977 of the California Rules of Court[20] and Section 6076, Rule 17, of the California Business and Professions Code,[21] an unpublished opinion of the Fourth District of the California Court of Appeal.[22] Such attempt avails Petitioner nothing. This occurs because

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[20]See footnote 1, page 1.
[21]See footnote 2, page 1.
[22]See footnote 17, page 4.

the California Court of Appeal is not "a state court of last resort" and, pursuant to decisions of the California Supreme Court, *the* state court of last resort, an unpublished opinion or decision has *no* effect and may not be relied upon by *any court* or *any party* in any action except as prescribed in Rule 977.[23] See *Knouse v. Nimocks* (1937), 8 Cal. 2d 482, 484; *Estate of Kent* (1936), 6 Cal. 2d 154, 156.

As will also be shown herein, the decision of *Gates, supra*, does not conflict with applicable decisions of this Court or of other Courts.

Petitioner's Arguments Concerning Admissions of the Entitlement Claimed Are Irrelevant and Were Fully Considered by the Courts Below.

Petitioner claims that the District Court and the Ninth Circuit refused to consider contentions pled by Petitioner in the original complaint.[24] Such allegations are patently untrue and not sustained by the record.

Both the District Court and the Ninth Circuit *explicitly* stated that they had assumed, for the purposes of the decisions below, that the allegations of the Petition were true.[25] In so doing, the District Court, in granting summary judgment, held:

> "However, none of the issues decided above is decided on the basis of disputed facts; in every instance the Court has accepted all of plaintiffs' allegation as true, and has denied the claims on legal grounds."[26]

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[23]Rule 977 (Appendix 1) prohibits citation or reliance upon an unpublished opinion except under the doctrines of law and the case, res judicata, collateral estoppel or when relevant to a criminal or disciplinary action. None of these exceptions has been put forth by Petitioner.

[24]Petition, pp. 22-25.

[25]See footnote 11, page 3.

[26]D.E. 51, p. 11.

The Ninth Circuit, in affirming, held that their "decision is based on legal as opposed to factual issues."[27]

Petitioner's Reliance on a Depublished Opinion of an Intermediate Court of Appeal in California Is Unethical and Not Permitted by California Law.

As will be shown herein, numerous decisions and Federal Circuits, along with California, prohibit the citation of a case that has been depublished or is unpublished. Instructive in the present case is the fact that Petitioner is aware of this and yet he is requesting this Court to violate such procedure. Petitioner filed with this Court an "Application for Extension of Time to File Petition on Writ of Certiorari" which was dated November 22, 1983. Attached thereto was a "Declaration of Gregory G. Petersen, Esq., etc." in which Petitioner's attorney declared under penalty of perjury (p. 3, para. 4, lines 14-20):

> "[W]eighing the concerns that the Court's opinion was inappropriate and thus implicating the duties of counsel as an officer of the Court to advise the Court of such a possibility of error, the firm had drafted a letter which would have requested the depublication of the opinion and thus, under the *Local Rules of Court*, Rule 21(c), corrected the error perceived by this declarant by removing the precedential value from the opinion."

Petitioner understands that the effect of depublishing an opinion of any intermediate court of appeal removes *all* "precedential value" from the opinion. Yet, here we find the same attorney, representing Petitioner, asking this Court to grant "precedential value" to a depublished opinion of an intermediate state court. Petitioner cites this as the main reason for reversing the Ninth Circuit. While such request flies in the face of the Rules of Professional Conduct of the

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[27]*Gates, supra*, at 735, fn. 7.

State Bar of California,[28] the California Rules of Court,[29] and precedent within the State of California, it shall be shown that it also ignores the holdings and rules of the Federal Courts.

The Court of Appeals for the District of Columbia Circuit has held that unpublished opinions, even those decided within that Circuit, do not establish precedent of any kind within the Circuit. *Environmental Defense Fund, Inc. v. Higginson* (D.C. Cir., 1979), 631 F.2d 738, 739, fn. 1. Therefore, even when the *same* Circuit has decided the *same* question within the *same* year in an unpublished decision, it will consider the issue anew. *Id.*; *see Love v. Budai* (D.C. Cir., 1981), 653 F.2d 513; *L. R. Willson & Sons, Inc. v. Donovan* (D.C. Cir., 1982), 685 F.2d 664, 669, fn. 7.

When local rules of a court, such as Rule 977, *require* that unpublished opinions are not to be cited in briefs, memorandum, or even argued to the same court as precedent, it would be improper to cite and argue such opinion to this Court. *Love v. Budai, supra*; *United States v. Kinsley* (8th Cir., 1975), 518 F.2d 665, 670, fn. 10.

Any opinion which has been ordered depublished by the California Supreme Court is not binding on any other California court of coordinate or lower jurisdiction and therefore is not binding upon the Federal Courts. *See Connecticut State Federation of Teachers v. Board of Education Members* (2d Cir., 1976), 538 F.2d 471, 485; *Johnson v. MacCoy* (9th Cir., 1960), 278 F.2d 37, 40.

The California courts have uniformly held that a decision by the California Court of Appeal, such as the unpublished opinion[30] cited by Petitioner, which has been ordered de-

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[28]See footnote 2, page 1.
[29]See footnote 1, page 1.
[30]See footnote 17, page 4.

published by the California Supreme Court under Rule 977, "is not available as precedent." *Powers v. Sissoev* (1974), 39 Cal. App. 3d 865, 872, fn. 8; *see People v. Gomez* (1972), 26 Cal. App. 3d 928, 930-931; *People v. Duncan* (1974), 40 Cal. App. 3d 940, 946, fn. 5.

The only case cited by Petitioner in support of the position that a non-published or depublished case has any value whatsoever, *Gray v. Kay* (1975), 47 Cal. App. 3d 562, is not on point, since that case *specifically* dealt with a case which was decided and ordered non-published *prior* to the adoption of Rule 977 on January 1, 1974. *Id.*, at 566.

In the Federal and California courts, it has almost been unanimously held that "unreported opinions may not be cited as authorities since they have no precedential value." *United States v. Fox* (D.C. Cir., 1972), 473 F.2d 131, 136, fn. 11; *Taylor v. Hearne* (9th Cir., 1981), 637 F.2d 689, 692; *Southern Railway Company v. Foote Mineral Company* (6th Cir., 1967), 384 F.2d 224, 228; *Chabot v. National Securities and Research Corp.* (2d Cir., 1961), 290 F.2d 657, 659; *Old Kent Bank and Trust Co. v. United States* (6th Cir., 1966), 362 F.2d 444, 450; *Curry v. Fred Olsen Line* (9th Cir., 1966), 367 F.2d 921, 925, fn. 18; *Russell v. Atlas Van Lines, Inc.* (D.C., E. Okla., 1976), 411 F.Supp. 111, 113; *American Fidelity & Casualty Company v. Indemnity Insurance Company of North America* (6th Cir., 1962), 308 F.2d 697, 700; *Knouse v. Nimocks, supra*, at 484; *Estate of Kent, supra*, at 156; *Powers v. Sissoev, supra*, at 879, fn. 8; *People v. Gomez, supra*, at 930-931; *People v. Duncan, supra*, at 946, fn. 5.

This is in accord with the decision of the other state courts. The Supreme Court of Tennessee, with respect to one of its own decisions, stated many years ago, in *Phoenix Cotton Oil Co. v. Royal Indemnity Co.* (1918), 140 Tenn. 438, 442-443, 205 S.W. 128, 130:

> "The opinion was not ordered published in our reports. It remained, therefore, under the rule of this court, only the opinion of the judge who filed it, and valuable merely for its reasoning, although the judgment rendered in the case was the judgment of the whole court.
>
> The court does not encourage the citing of the unpublished opinions of its members, and never refers to them unless compelled to do so by a reference of counsel thereto."

This Court has decided, in *King v. Order of United Commercial Travelers of America* (1948), 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. 608, that if decisions are not published, digested, or indexed, filed only where decided, binding solely upon the parties who are before the court in that particular case, and would not constitute precedent in any other case in that court or any other court of the state (*id.*, 333 U.S. at 160, 68 S.Ct. at 492) that:

> "[I]t would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court." *Id.*, 333 U.S. at 161, 68 S.Ct. at 493.

In California, decisions that are ordered depublished by the California Supreme Court pursuant to Rule 977 may not be published, digested, cited, argued or referred to. They have no weight as precedent within the state system of courts since they bind only the parties before the court in that particular case. The same division of the California District Court of Appeal that decided the case, as well as other divisions of the same District Court[11] and other District Courts of Appeal in California, do not consider them and they are not binding in any way as precedent. It would therefore be incongruous to attempt to hold the Ninth Circuit

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[11]See discussion *infra*, pp. 12-13.

bound by a decision which is not binding on *any* court in the State of California.

The practice of determining cases without a published opinion is one that has long been practiced. Each year, literally hundreds of opinions are not published.[32] For example, see cases listed at 612 F.2d 569 through 587, some of which are specifically listed as not citable for precedent.[33] In a review of publication and citation provisions of the various Circuits of the United States Court of Appeals, it was found that seven of the Circuits either did not allow or disfavored citation[34] and the only Circuit (Tenth) which allowed citation publishes a subject matter index of all its unpublished opinions that is widely circulated.[35] One of the strongest arguments for not allowing unreported, unpublished opinions to be given any weight is that it is impossible to "shepardize" these decisions to determine whether they have been reversed or overruled.[36]

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[32]78 Columbia Law Review 1167 (1978); "The Non-precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals," William L. Reynolds and William M. Richman. Appendix 3 hereto contains an updated listing of the no-citation rules of the various Circuits of the Court of Appeals of the United States which reflects that, in the five years since the review by Reynolds and Richman, the trend with the new Circuits, *i.e.*, Eleventh, Temporary Emergency and Federal Circuit, is to go along with the majority and not allow citation of unpublished opinions. Today, ten (10) Circuits do not allow citation to any unpublished opinions, two (2) Circuits disfavor citation but allow it under specified conditions, one (1) Circuit has no rule, and only one (1) Circuit allows citation. It is difficult to find that the unpublished opinions of this latter Circuit are in reality "unpublished" since a yearly index is widely available and circulated. See Appendix 3.

[33]*United States Court of Custom and Patent Appeals*, 612 F.2d 585; *United States Court of Appeals, District of Columbia Circuit*, 612 F.2d 586. The First Circuit Court of Appeals has stated that its unpublished opinions range from 45% in 1967 to 61% in 1972. Appendix B, Rules of the United States Court of Appeals for the First Circuit.

[34]78 Col. L. R., *supra*, at 1207; but *see* Appendix 3 and fn. 25.

[35]*Id.*, at 1181; Appendix 3.

[36]*Id.*, at 1185, fn. 104.

In California it has been concluded that unpublished opinions should not be cited.[37] So strong is this practice that the California Supreme Court has depublished an opinion of a California District Court of Appeals on the grounds that the opinion cited an unpublished opinion.[38] The policy and rationale supporting this practice is found in the dissent by Justice Jefferson in *People v. Valenzuela* (1978), 86 Cal. App. 3d 427, 438, wherein Rule 977 is fully discussed. Therein, Justice Jefferson discussed the reasons for the Rule, the necessity of the Rule (*id.*, at 440-441), the constitutionality of the Rule (*id.*, at 440), and the validity, authority and power of the California Supreme Court under this Rule (*id.*, at 441) which does not violate the concept of *stare decisis* (*id.*, at 442-443), or statutes (*id.*, at 443-444).

The Doctrine of Comity Does Not Require Abstention Where Petitioner Has Previously Exhausted His State Remedies or Concurrence With an Unpublished Opinion Which Is Not Binding on Any Court.

Petitioner argues that the Ninth Circuit failed to abstain to the state trial and appellate courts which would hear the case if the Federal Court abstained.[39] What Petitioner has neglected to tell this Court is that the unpublished opinion of Division I of the Fourth District of the California Court of Appeal in San Diego is not binding upon Division III, in Orange County, which would hear any future appeal from a trial court in Orange County. This occurs because even *published* decisions of the *same* District Court of Appeal in California are *not binding* upon other Divisions within the same District. *Theresa Enterprises, Inc. v. Davis* (1978),

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[37]24 Hastings Law Journal 37, 39 and 53 (1972): "The Use of Unreported Cases in California," Robert A. Seligson and John S. Warnlof.

[38]*Id.*, at 48.

[39]Petition, pp. 25-30.

81 Cal. App. 3d 940, 947, 146 Cal. Rptr. 802; 6 Witkin, Cal. Procedure, Sec. 67, p. 4580 (2nd ed., 1971).

It therefore holds that, since a published decision need not be followed by other Divisions within the same District, unpublished opinions need not be followed even within the same Division of the same District, since that opinion is no more authoritative than a brief by its author. *Curry v. Fred Olsen Line, supra*, at 925, fn. 18.

There is even a further reason why the Doctrine of Comity does not apply. There is no venue for a state trial other than the Superior Court of the County of Orange. Since Petitioner had already, in September 1980,[40] exhausted unsuccessfully his state venue, any attempt to refile would be barred by the Doctrine of Res Judicata. Petitioner has previously refused to ask Division III in Orange County of the Fourth District of the California State Court of Appeal to review this decision of the Orange County Superior Court denying relief.

The Ninth Circuit and District Courts' Decisions Are Not in Conflict With Applicable Decisions of This Court and Other Circuits.

Petitioner's argument[41] is nothing more than a reargument and rehashment of the same arguments already put forth in the District Court and Ninth Circuit. A review of the record below, including written and oral arguments before the District Court and Ninth Circuit, reveals almost each and every case or argument cited by Petitioner to this Court was previously before one or both of the courts below. Petitioner attempted to distinguish the Ninth Circuit's prior decisions of *Erdelyi v. O'Brien* (9th Cir., 1982), 680 F.2d 61, and

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[40]See footnote 3, page 2.

[41]Petition, pp. 15-22.

Jacobson v. Hannifin (9th Cir., 1980), 627 F.2d 177,[42] in both the District Court and Ninth Circuit. This was argued extensively in both Appellants' and Appellees' Opening Briefs in the Ninth Circuit and will not be repeated herein.

Petitioner's argument that he has a vested entitlement in the privilege to carry a concealed weapon,[43] flies in the face of the well reasoned rationale of the Ninth Circuit and the District Court, wherein it was stated that the statutorily required good cause "does not create a constitutionally protected interest, because it is not a 'significant substantive restriction on the basis for [the] agency's action.' *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). *See also Erdelyi v. O'Brien, supra*, ..."; *Gates, supra*, at 734.[44]

Conclusion.

It is suggested that the Petition for Writ of Certiorari should be denied and the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

ADRIAN KUYPER,
County Counsel,
EDWARD N. DURAN,
Deputy,
Attorneys for Respondents.

---

[42]Petition, pp. 19-21.
[43]See footnote 41, page 13.
[44]D.E. 51, pp. 7-8.

APPENDIX 1.

"Rule 977. Citation of unpublished opinions prohibited; exceptions

(a) [Rule] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation."

APPENDIX 2.

"Rule 17. Misquotation; citations

A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional."

APPENDIX 3.

Court of Appeals of the United States, Circuit	Citation Permitted
District of Columbia	No. Rules 8(f) and 13(c).
First	No. Rules 14 and Appendix B(b)6.
Second	No. Rule 0.23.
Third	No statement.
Fourth	Disfavored, but permitted under certain specified conditions. Rule 18(d).
Fifth	Disfavored, but permitted under certain specified conditions. Rule 47.5.3.
Sixth	No. Rule 24(b).
Seventh	No. Rule 35(b)(2)(iv).
Eighth	No. Rule 8(i) and Plan, para. 3.
Ninth	No. Rule 21(c).
Tenth	Yes, but index to unpublished decisions widely circulated. Rule 17(c).
Eleventh	No. Rule 25.
Temporary Emergency	No. Rule 21(k).
Federal Circuit	No. Rule 18(a).

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No. 83-1145
IN THE

Supreme Court of the United States

October Term, 1983

ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

PETITIONER'S REPLY BRIEF.

ARGUMENT.

The Respondents Have Failed to Address the Questions Raised by the Petitioner Herein.

Respondents ignore the four questions presented in the Petition for Certiorari (hereinafter "Petition") and raise three questions of their own by which they attempt to obviate the issues raised by Petitioner. By this device Respondents avoid the issues of substantive law and dwell on procedural questions in a greatly reduced context.

The Respondents Misstate the Development of This Case Since There Were No State Court Adjudications.

Respondents, in their "Brief in Opposition" (hereinafter "Brief") state:

> After unsuccessfully pursuing this matter in the California State Trial Court, [fn omitted] Petitioner filed

the instant action in the United States District Court for the Central District of California . . ." (Brief, p. 2).

In a footnote Respondents attempt to lead this Court to the conclusion that the federal issues now before this Court were litigated in the California Superior Court. Respondents again attempt to support this conclusion by claiming that the Doctrine of Res Judicata would bar the instant litigation should abstention be granted. (Brief, p. 13).

The State Court litigation set forth in footnote 3 of the Brief in Opposition never litigated the issues before this Court, the Court of Appeal, or the District Court. It is incredible that a member of the Bar could conclude, as here, that Petitioner unsuccessfully pursued this matter in a "California Trial Court" (Brief, p. 2) much less claim that the State Court acted in such a manner as to cause this action to be "barred by the Doctrine of Res Judicata." (Brief, p. 13).

The litigation set forth in footnote 3 of the Brief in Opposition was originally filed on September 17, 1980 seeking a Writ of Mandate to compel Respondents to comply with California Government Code §§3500 *et seq.* and related state laws.[1] The litigation was not brought pursuant to Title 42, United States Code §1983 and did not address federal constitutional questions. Counsel for Respondents herein successfully opposed a Motion by the Petitioner herein to amend the State Court Petition to include the federal claims.[2]

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[1]The "Association of Orange County Deputy Sheriffs" is an employee organization filling the role of labor union and represents all Orange County Deputy Sheriffs and Orange County District Attorney investigators pursuant to California Government Code §§3500 *et seq.*

[2]With the exception of this litigation as commenced in the United States District Court for the Central District of California no court has determined the federal rights of the Petitioner herein.

The Ninth Circuit Did Not Consider, nor Did the Parties Argue the Effect of Depublication Albeit Petitioner Requested Such Briefing Be Allowed.

Respondents also claim that the value to be given an opinion subsequently ordered not to be published by the California Supreme Court was "orally argued before the Ninth Circuit and subsequently addressed in letters to the Ninth Circuit panel when the California Supreme Court later ordered the case depublished." (Brief, pp. 3-4).

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") never addressed, at oral argument or elsewhere, the effect of the California Supreme Court depublishing the opinion in *Monzingo v. City of Garden Grove*, 190 Cal.Rptr. 750 (1983).[3] At the time of oral arguments the opinion was "published." The only comment on the unpublished status, as subsequently ordered by the California Supreme Court, came in letters to the Clerk of the Ninth Circuit. Despite the claim of Respondents the letters do not "address" the issue.[4]

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[3]The opinion is still published at 190 Cal.Rptr. 750 (1983) albeit not in 141 Cal.App.3d 830.

[4]The letters stated:

Phillip B. Winberry, Clerk
United States Court of Appeals
for the Ninth Circuit
1699 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90010

Re: *Association of Orange County Deputy Sheriffs, et al., v. Brad Gates, et al.*; 82-5686

Dear Mr. Winberry:

At oral arguments on May 3, 1983, before Circuit Judges Richard Chambers, Anthony M. Kennedy, and Procter Hug, Jr., the California case of *Monzingo v. City of Garden Grove, et al* (4 Civil 28354) was cited and argued in light of the above-referenced case. At that time, the California Court of Appeal had ordered this case to be published.

The California Supreme Court, by order dated May 25, 1983, has ordered that this opinion *not* be published pursuant to Rule 976(c)(2) of the California Rules of Court and therefore this opinion which has

(footnote continued on following page)

The California Supreme Court Never Determined That the Decision of *Monzingo v. City of Garden Grove* Lacked Value or Legal Reasoning.

Respondents claim the California Supreme Court determined the *Monzingo* decision was of such little value and

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been de-published may not be cited or relied upon by any court or any party in any proceedings pursuant to Rule 977(a) of the California Rules of Court.

We are attaching four copies of this order of the California Supreme Court and ask that you transmit this order, along with a copy of this letter, to the panel noted above.

By copy of this letter we have informed counsel for Appellants of these facts.

Very truly yours,
ADRIAN KUYPER, COUNTY COUNSEL
By John W. Anderson, Assistant
for Edward N. Duran, Deputy

END:dh
Atts.
cc: Gregory G. Petersen

Mr. Phillip B. Winberry, Clerk
United States Court of Appeals
for the 9th Circuit
P.O. Box 547
San Francisco, CA 94101

Re: *Association of Orange County Deputy Sheriffs, et al., v. Brad Gates, et al.*, 82-5686

Dear Mr. Winberry:

I have received a letter directed to you from the offices of the County Counsel of the County of Orange with regard to the aforementioned litigation. Opposing counsel asks that you direct this letter and the information contained therein to the panel which heard the matter and it is the purpose of this letter that that not be done or alternatively, if done, that the panel be informed that counsel for the appellants does not concur with the legal conclusions set forth in the communique and that the matter, in the opinion of appellant's counsel, should be subject to briefing if it is to be considered by the panel.

Thank you very much for your cooperation in this matter.

Sincerely,
GREGORY G. PETERSEN
AND ASSOCIATES
by Gregory G. Petersen
Attorney at Law.

GGP/pl
cc: Edward N. Duran, Deputy County Counsel

legal reasoning that it should be depublished.[5] The most that the Respondents can claim is that the opinion did not meet the criterion for publication as set forth in the footnotes to the California Rules of Court, Rule 975(b).[6] The criterion for publication "calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation."

As shown by the *Monzingo* decision, the California Court of Appeals relied on established precedents and applied them to a straight forward fact situation, *i.e.*, "Certainly, any active or honorably retired city police officer under these provisions have a legitimate claim of entitlement to the privilege (See *Board of Regents v. Roth* (1972) 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548)." *Monzingo*, Petition, Appendix "C", p. 57.

Petitioner's position is the same as that taken by the California Court of Appeal which is not reflected in any other opinion in this matter and this Court should examine the issues presented as the final arbiter of the United States Constitution. Respondents' suggestion that "This Court should not entertain reargument and rehashment of the same trite arguments already put forth by Petitioner" (Brief, p. 4) fails to examine the overall effect of the decision at bar. Petitioner respectfully submits that an examination of the

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[5]The "members" of the California Supreme Court are the Chief Justice and Associate Justices of the Supreme Court of California. These Justices, according to Respondents, have stated that the Justices of the Court of Appeal entered a decision that was legally unsound. This has not occurred.

[6]California Rules of Court, Rule 975(b) is set forth as Appendix H to the Petition for Certiorari.

record will show that the respondents' position is wholly unsupported.

The Local Rules of Court for the Ninth Circuit and the California Rules of Court Effect the Respective Courts but Not Each Other.

Respondents fail to go beyond the superficial claim that an unpublished opinion is not "precedent." As noted in *Factors Etc., Inc. v. Pro Acts, Inc.* (2nd Cir. 1981) 652 F.2d 278, 282-283, "a Federal Court's decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal." Here the Respondents admitted by their Answer that Honorably retired peace officers are entitled to the benefits of Penal Code §§12027 and 12031. The California Court of Appeal confirmed that a protected property interest is vested by Penal Code §§12027 and 12031. The decision is published at this time at 190 Cal.Rptr. 750 (1983); albeit the unofficial case reports. The difficulty is that the Ninth Circuit, at the time of oral argument, was faced with an officially published decision. While this decision was subsequently unpublished by the California Supreme Court, it was not disturbed. A federal court has now decided squarely against the decision of the intermediate appellate court while being "directly" aware of that Court's "predisposition" in interpreting a state statute. *cf. Memphis Development Foundation v. Factors, Inc.* (6th Cir. 1980) 616 F.2d 956, 958.

Respondents' Argument of Improper Conduct Is Wholly Inappropriate.

In their brief Respondents attempt to accuse Petitioner's counsel of unethical conduct in order to oppose the Petition for Certiorari. This argument is no more and no less another attempt at obfuscation. In the trial court the Respondents cited two unpublished California Superior Court trial de-

cisions. California Trial Court opinions are never published.[7]

Petitioner submits that the Respondents' argument is no more than a Red Herring designed to again obfuscate the substantive legal issue. The simple matter of fact is that the opinion *was* published when presented to the Ninth Circuit and its subsequent depublication, without modification, does not relieve the Ninth Circuit of its obligation to ascertain the predisposition, directly or indirectly, of the California Courts on these state statutes.[8]

Respondents Claim That the Doctrine of Comity Does Not Apply and Also Fails to Consider Any Precedents on Abstention.

The Respondents claim that comity and abstention need not apply here. Their rationale again focuses on "unpublished" decisions being without precedent. The focus of Comity and Abstention is not which court, state or federal, decides the issue first. Respondents were satisfied when they believed the weight of unpublished state trial court opinions favored their position (if in fact they did); but now complain that the federal court is wholly free to disregard a State Court of Appeal interpretation of its own State's statute. This is pure opportunistic advocacy and fails wholly to examine the issues presented. California Peace Officers know of the *Monzingo* decision and the *Gates* decision. The conflict between the two decisions is inexplicable and certainly leaves California Peace Officers in a quandry as to how two intermediate Courts of Appeal can come to wholly opposite conclusions on the same statutes with reliance on the same cases. While Petitioner clearly believes that the statute was

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[7]The appellate decision of the California Court of Appeal was published at the time or oral argument in the Ninth Circuit.

[8]Petition, pp. 25-28.

clear and appropriate for federal relief this is no longer so since the state and federal appellate decisions "has at least raised such doubt as to the applicable . . . law" that abstention is required. *Cf. Huddleston v. Dwyer* (1944) 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246; *Davis v. Mann* (1964) 377 U.S. 678, 690, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Hillsborough Township v. Cromwell* (1946) 326 U.S. 620, 628, 66 S.Ct. 445, 90 L.Ed. 358.

Conclusion.

For the reasons set forth in the Petition the Court should determine the questions raised by the Petitioner. The consequence of the decision which is before this Court is, but for this Court's action, to deny all honorably retired California Peace Officers a means of livelihood and a vested property interest.

Dated: March 16, 1984.

Respectfully submitted,

PETERSEN & FERGUSON,
A Law Corporation,
By GREGORY G. PETERSEN,
Attorneys for Petitioner.